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A

TREATISE

ON THE

LAW OF BAILMENTS.

BY

ISAAC EDWARDS,

COUNSELOR AT LAW.

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PREFACE.

THE object of this work is to present the LAW OF BAILMENTS concisely, as drawn from and illustrated by the decisions of courts governed by the common law; and so arranged, it is hoped, as to prove a serviceable and acceptable book. Though the method chosen, of collating the adjudications under appropriate heads, has occasionally resulted in a restatement of the same principles under a modified form, it has this advantage, of presenting the subject in a natural order. The general arrangement is that usually adopted by approved writers on this branch of the law; while in respect to subordinate divisions, it has been deemed convenient to make them with reference to *subjects*, so as to present the law upon each in a condensed and useful form. In this manner the rights, duties and remedies of each of the parties to the contract of bailment are considered under specific heads, with a view to their application to the matter in hand. The rule, fixing the bailee's responsibility for care and diligence in each species of bailment, is treated by itself, and also in connection with the particular duty brought in question. In this way the adjudged principles, applicable to a given subject, are brought together in a brief space, and arranged so as to be readily examined.

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The difficulty of expressing legal principles in purely abstract terms, often renders it convenient and necessary to present them briefly as they stand incorporated with facts in the reported cases, thus uniting authority with the illustration employed. Such explanations are both pertinent and perspicuous; and where the facts can be given in few words, there is no better way of developing the principles and rules of law. It may be more agreeable to the student, who studies the law solely as a science, to meet with illustrations from the civil code and those systems of jurisprudence derived pricipally from it; but they whose occupation compels them to investigate the law as a business of life, with a view to its immediate and prompt application to practical affairs, have seldom the leisure to master and appreciate other codes as a means and mode of explaining the common law.

If any apology is thought necessary in presenting to the profession a treatise on a subject already treated with so much learning and ability, by a distinguished writer, it is believed that the practical design of this work will be sufficient to commend it to a favorable reception. The commentaries of Mr. Justice Story occupy a field by themselves, replete with illustrations drawn from foreign laws and adapted primarily to the demands of a lectureship, leaving ample room for an essay on the Law of Bailments as derived mainly from the decisions at common law. There is less scope permitted in such a work, because there is less opportunity for that theoretical discussion of elementary principles which is so attractive to the speculative student.

The authority of adjudications, being of first importance, is not to be evaded or defeated by any line of subtle argument. "When a point of law has been once adjudged, neither that question, nor any, which completely and in all

its circumstances corresponds with *that*, can be brought a second time into dispute; but questions arise which resemble this, only indirectly and in part, in certain views and circumstances, and which may seem to bear an equal or greater affinity to other adjudged cases; questions which can be brought within any fixed rule, only by analogy, and which hold a relation by analogy to different rules. It is by the urging of these different analogies that the contention of the bar is carried on; and it is in the comparison, adjustment and reconciliation of them with one another; in the discerning of such distinctions, and in the framing of such a determination as may either save the various rules alleged in the cause, or if that be impossible, may give up the weaker analogy to the stronger; that the sagacity and wisdom of the court are seen and exercised."[1] This competition of opposite analogies furnishes the true sphere of legal discussion; and hence a treatise on any branch of the law, designed for practical utility, must of necessity be confined within the same limits, leaving the region of speculation to those philosophical students who may have the leisure and taste for such studies.

With a law library at hand, unsurpassed by any in the country, containing the reports of every state in the Union, it may be mentioned with propriety that the materials for a thorough investigation and comparison of authorities have certainly not been wanting in the execution of this work.

The importance of the subject increases constantly with the increase and multiplication of the relations of business, especially in regard to the carriage of freight and passengers by the new modes of transportation by railroads and steam vessels, lately introduced and quite recently brought into

[1] Dr. Paley's Moral and Political Philosophy, Book vi., c. 8.

general use. From such and similar changes in the modes of business, there arise continually new applications of the principles of law, previously settled; and these become the more important from the fact that each new decision varies but a shade from the previous cases, and is pronounced with that caution which has been termed the sinew of wisdom. "The true idea of the common law seems to be that of an organized system, having its principle of growth within itself, and of which the judges are themselves a part. No new law can ever proceed from them; but the old law is, by their means, in a continual process of further development. Their business, in the most doubtful and unforeseen cases, is still to consider the law as already fixed, to discover and to assert it."[1]

Though superficial and inconstant students may turn away from the law as a confused and incomprehensible system, the lawyer, who loves his profession, turns, with a feeling akin to exultation, to those superior men who appreciate and speak of it, as the gathered wisdom of a thousand years — as the pride of the human intellect — a science which, with all its defects, is the collected reason of ages, combining the principles of eternal justice, with the infinite variety of human concerns.

ALBANY, *June* 4, 1855.

[1] Burton Elem. Comp., p. 3.

TABLE OF CONTENTS.

CHAPTER I.

ON BAILMENTS.

PAGE.

The general subject, ... 33
Definitions, ... 33, 34
There are five classes of bailment, ... 35
Deposits to be kept gratuitously, ... 35
Mandates or gratuitous commissions, ... 35, 36
Commodatum, gratuitous loans, ... 36
Pawns or pledges, *pignori acceptum*, ... 37
A hiring, for use, of custody, of labor and services, of carriage, ... 37, 38
Various degrees of the bailee's liability, ... 38, 39
Grounds of liability, ... 40, 41, 42, 43
The use of terms, ... 43
Ordinary diligence, ordinary neglect, slight neglect, gross neglect, ... 44
The rule varies with circumstances, ... 44, 45
General principles witnessed by adjudged cases, ... 45, 46

CHAPTER II.

ON DEPOSITS.

What is a deposit, ... 47
A deposit, always gratuitous, ... 47
The rule is the same whether it be voluntary or involuntary, ... 47
The subject of deposit must be some movable thing, ... 48
Choses in action, such as notes, deeds, &c., may be deposited, ... 48
Implied contracts, how raised, ... 48
PARTIES TO THE CONTRACT, ... 49
All persons are capable of contracting, except, ... 49
Married women and persons of unsound or deficient mind, ... 49
Married women not capable, ... 49, 50
Infants are capable, not bound, ... 50, 51
Persons of unsound mind and memory are of four classes, ... 51

PAGE.

Idiots, those who have become demented, lunatics and drunkards, ... 51, 52
The presumption is in favor of capacity, ... 52
The ground and rule, fixing incapacity, ... 52, 53, 54
The lunatic liable for torts only in his estate, ... 54, 55
THE FINDER, ... 55
Not compelled to take up lost property, ... 55
But must take care of it, if he does, ... 55
Nature and theory of the action of trover, ... 55
It implies the duty to take care of property found, ... 55
Acts of conversion, the finder's right of reward, ... 56, 57
Has a special property, ... 56
Salvors, salvage, rule of estimating it, ... 57, 58
THE CONSIDERATION, ... 58
Every contract must have a consideration, ... 58
The undertaking of the trust a good consideration, ... 58, 59
SHERIFFS AND RECEIPTORS, ... 59
The sheriff is not an insurer, but must keep the property he levies on safely, 59
The rule as to receivers, county treasurers, postmasters and revenue officers, 59
The receiptor's liability, ... 60
He has a special property, and may defend the goods by action, ... 60, 61
Seizure on execution gives the officer a special property, ... 62
If the receiptor permit the goods to be sold by general owner, he is liable, 62
The receiptor cannot deny the sheriff's title, ... 62, 63
The doctrine of estoppel applies to him, ... 63
GENERAL AND SPECIAL PROPERTY, ... 64
Absolute property draws after it the possession, ... 64
Special property arises out of contract, as for use or keeping, &c., ... 64
The finder has a special property, ... 65
Possession evidence of title; as to choses in action, when, ... 65, 66
Special property in animals, wild by nature, ... 66
SPECIAL DEPOSITS, CARE REQUIRED, ... 66
Deposits in banks, not bailments, but debts, ... 66
The rule different formerly; a case of special deposit, ... 66, 67
The depositary answerable for gross neglect, ... 67
Gross neglect, what, and whether fraud or not, ... 67, 68–74
Duty of depositary, how measured, ... 67, 68
Gross neglect not necessarily a fraud, ... 68, 69
The presumption arising from gross neglect, ... 69, 71
Right to agree for a lessened liability, ... 70
An early case, ... 71, 72
The care must have respect to the thing deposited, ... 72
The character of the depositary, when important, ... 73, 74
May be responsible even when his own goods are lost, ... 74
RIGHT OF ACCESSION, ... 74
Under the civil law, civil fruits, ... 74
Materials made into another article, title to, ... 75
Rule under the common law, ... 76, 77
The owner of land acquires buildings erected on it, ... 77, 78

PAGE.
Rule of Roman and French law, ... 78
A trespasser can acquire no title to materials of another, ... 78, 79
An early case to same effect, ... 79, 80
One who wrongfully creates a confusion of goods loses his portion of them, 81, 82
The title passes only from the necessity of the case, ... 82
A SECOND BAILMENT, effect of and rights under, ... 83
THE DELIVERY, ... 83 – 89
The bailee bound to redeliver to bailor, ... 84
Garnishment and interpleader, ... 84, 85
Deposits by joint owners, deliverable on joint demand, ... 85
Under the Code of Louisiana, redelivery, ... 86
An act of conversion by the bailee, ... 87
Right of countermand, when it exists, ... 87
Effect of a demand, ... 87, 88, 89
RIGHT TO USE, is acquired by consent of owner, ... 89 – 93
Consent, when implied, ... 89, 90
Effect of use without consent, ... 90, 91
Expenses of deposit, use when a compensation, ... 90
Depositary may not pledge goods, ... 91
Effect of a pledge of them, ... 92
Effect of a deposit made by one not the true owner, ... 92, 93
As to stolen goods, ... 93
As to goods acquired by a fraudulent purchase, ... 93

CHAPTER III.

GRATUITOUS COMMISSIONS OR MANDATES.

NATURE OF THE CONTRACT, ... 94, 95
Mandator, Mandatary, Mandate, ... 95
THE SUBJECT OF THE CONTRACT, must be personal property 95, 96
The contract under Code of Louisiana, ... 96, 97
FEASANCE AND NON-FEASANCE, CONSIDERATION, ... 97
Distinction between contract of mandate and deposit, ... 97
The distinction between non-feasance and misfeasance, ... 98
The mandatary answerable for misfeasance, ... 98
But not for a non-feasance, ... 99
A promise to become a mandatary not valid, ... 99, 100, 101
But he is answerable for a negligent performance, ... 101
CARE AND DILIGENCE REQUIRED, ... 102
The mandatary answerable for loss from gross neglect, ... 102
He must act prudently, ... 102, 103
His care must be such as circumstances require, ... 104
Must have respect to the thing bailed, ... 105
It is his duty to deliver goods received for carriage, ... 105
Effect of a non-delivery, ... 105, 106
Ground of his obligation and its extent, ... 106, 107
Bound only to act faithfully and honestly, ... 107

PAGE.

And with reasonable prudence, ... 108
The Contract, ... 108
Does the mandatary enter into a legal contract, ... 108, 109, 110
The remedy against him, ... 108
The form of the action, ... 109
Assumpsit and case, when brought, ... 109, 110
Complaint in an action of case, ... 110
The form of the pleadings does not negative the existence of a contract, 110, 111
A breach of a trust will support an action, ... 111
A bank receiving a note for collection, bound to protest it for non-payment, 112, 113
The law implies a contract to do so, ... 113
The rule is the same under civil law, ... 113
Duties of bank directors, ... 113
Bound for reasonable care, ... 114
A misuser is a conversion, ... 114
Duty of one who volunteers to act as a bailee, ... 114, 115
Remedies, ... 115 – 117
A third person may enforce contract, when, ... 115, 116
Form of the action, ... 116
The action of tort, when advisable, ... 116
Trover can be brought only for a conversion, ... 117
Case for violation of a legal duty, ... 117
Assumpsit, grounded on the contract, ... 117
Factors, ... 117 – 119
The factor has no right to pledge, ... 118
Effect of the statute, ... 118
Possession *prima facie* evidence of title, ... 119
The factor not a mandatary, ... 119
The Contract, how Determined, ... 119 – 128
By the death of the mandatary, when, ... 120
By the death of the mandator, ... 121
By the death of one of two joint mandataries, ... 121
Effect of dissolving the contract, ... 121
The death of one of the parties, effect of, ... 122
If the mandator dies, it is a revocation of a power, ... 122, 123
To contract in his name, ... 125
Contracts by letters, when complete, ... 123, 124
Previous contracts may be executed after the mandator's death, ... 125
The principal's death ends an agency, ... 126
So do insanity and marriage and sale, ... 126, 127
Right of revocation, ... 127
Effect of bankruptcy of one of the parties, ... 127, 128
Insolvency, ... 128
Burden of Proof, ... 128
Plaintiff must prove facts sufficient to show a right of recovery, ... 128
Must prove his allegations, ... 129
When the action is trover, plaintiff shows a conversion, ... 129
How this may be done, ... 130

PAGE.
When trover will not lie,..... 130
Assumpsit, when it lies,..... 131
CHANGE OF TITLE, FORMS,..... 131
A recovery and payment transfers the title,..... 131, 132
The act of conversion does not change the title, ... 132, 133
Forms of action under the Code, ... 133
The principles of law are not changed,..... 133, 134
When the mandatary may restore after suit, ... 134
The mandatary's interest in goods bailed..... 134
Exceptions to the general rule,..... 135
Negligence, not permitted at all,. 135, 136

CHAPTER IV.

GRATUITOUS LOANS.

A loan defined, ... 137
ELEMENTS OF THE CONTRACT,..... 137 – 142
The loan must be used for the purpose named, ... 138
Must be used with extraordinary diligence,..... 138, 139
Must be returned at the time specified,..... 139
The borrower required to know his own ability,..... 139, 140
The rule, how far qualified,..... 140
The civil law rule more variable..... 141
THE BORROWER'S INTEREST,..... 142
The borrower gains a temporary property, ... 142
Nature of this special property,..... 142, 143
The borrower obtains the possession and a right of action against strangers, 143
Right of revocation, its exercise, ... 143, 144
The borrower's interest ends with the use granted,..... 145
PARTIES. The parties contracting must have a legal capacity, ... 145 – 147
THE LOAN, HOW USED,..... 147 – 151
Must be used according to the contract, ... 147
The rule applies to notes and bills of exchange, ... 148
A different use, effect of, ... 149
The implied contract, what,..... 149, 150
A breach of the contract ends it, when,..... 150, 151
LENDER'S INTEREST IN THE LOAN,..... 151 – 158
The title remains in the owner,..... 151, 152
Has the borrower an interest in the loan as against the lender,..... 152, 153
Nature of the special property transferred,..... 154, 155
The loan is strictly precarious, when,..... 156, 157
Right of countermand,..... 157, 158
THE LOAN IS A PERSONAL TRUST,..... 158, 159
Distinctions between cases,..... 159
EFFECT OF FRAUD IN PROCURING THE LOAN,..... 160
Fraud vitiates all contracts,..... 160
Any concealment avoids the loan,..... 160, 161

PAGE.
The borrower considered a trespasser, when,..... 161
Distinction between larceny and fraud,..... 161, 162
WHO TO BEAR EXPENSES OF THE LOAN,..... 163
The borrower bears ordinary expenses,..... 163
CARE EXACTED OF THE BORROWER,..... 164
Bound for the greatest care and diligence,..... 164
The rule as derived from civil law,..... 165
THE BORROWER, WHEN EXEMPT FROM LIABILITY,..... 166
Exempt from loss by robbery, when,..... 166
Care exacted depends upon contract,..... 166, 167
The borrower not answerable for losses by irresistible force,..... 167
Nor for losses by act of God,..... 167
Act of God, what,..... 168, 169
Something other than inevitable accident,..... 168, 169
Inevitable mischance,..... 169, 170
Losses by public enemies and other hostile violence,..... 171
The borrower liable for casualties, when,..... 171, 172
Not liable for ordinary wear and decay,..... 173
VALUED LOANS, the civil law rule,..... 173
Valued loans at common law,..... 173, 174
BURDEN OF PROOF, rests on borrower generally,..... 175
On plaintiff to prove delivery of goods, and a failure to return,..... 175
Plaintiff proves facts constituting his cause of action,..... 175, 176
Burden of proof, how changed,..... 176
RESTITUTION,..... 177
The borrower bound to restore the thing borrowed,..... 177
The lender's right to terminate the contract,..... 178
The rule of the civil law,..... 179
The place where the return is to be made,..... 180, 181
The analogy between the debtor and borrower,..... 181, 183
The place of payment in specific articles,..... 182, 183
Joint borrowers bound jointly,..... 184
Countermand,..... 185
The loan for consumption, a sale,..... 186
Loans beneficial to both parties,..... 186
TRANSFER OF TITLE BY RECOVERY,..... 187
The payment of the recovery against the bailee, for the value of the goods, conveys the title,..... 187

CHAPTER V.

PLEDGES OR PAWNS.

NATURE OF THE CONTRACT,..... 188
It is mutually beneficial,..... 188
It accompanies the delivery of movable things,..... 189
Choses in action may be pledged,..... 189
Difference between a chattel mortgage and a pledge,..... 189, 190, 191

PAGE.
Requisites of the Contract, ... 192
The pledgor must own or have the right to pledge the goods, ... 192
The pledgor warrants his title or right to pledge, ... 193
As against real owner he pledges his interest, ... 193
Exception in respect to negotiable paper, ... 193, 194
A lien, what, ... 195
The pawnee may assign his interest, ... 196
A pledge of things not capable of delivery, ... 196
Possession essential to complete the pledge, ... 197
Incorporeal things, how pledged, ... 197
Notice of sale necessary, ... 198
The contract of pledge accessary to the principal debt, ... 199
The implied stipulation for care; right of use, ... 199
Effect of a payment of the original debt, ... 200
An incomplete contract of pledge, rights of parties, ... 200
What Property in Pledgor and Pledgee, ... 201
General property in pledgor, special property in pledgee, ... 201, 202
The Roman law, ... 202
Rights of parties not changed by death of either, ... 202, 203
Effect of a sale of pledge without notice, ... 204
At common law pledge not seizable on execution, ... 204, 205 – 208
The effect of the statute on the subject, ... 205 – 208
The mortgagee's interest, after forfeiture, may be levied on and sold, ... 209
But a chose in action cannot be sold on execution, ... 209
A legal right to possession for a definite time may be sold, ... 209, 210
The lien on personal property accompanies the possession, ... 210
The pledgee's lien may be transferred, ... 210
But cannot be severed from the debt secured, ... 211
Effect of a voluntary surrender, ... 211
A delivery to the owner for a special purpose, ... 211, 212
Notice to produce a written instrument, ... 212
Remedy of pledgor after payment of debt, ... 212, 213
The relation of pledgor towards pledgee similar to that of the factor towards his principal, ... 213
Effect of the factor's pawning the goods, ... 214
The statute in relation to factors and agents, ... 215 – 218
A case of mortgage or pledge, ... 218, 219
A mortgage is good between the parties to it, though possession be not delivered, ... 219, 220
A symbolical delivery is good, ... 220
The factor has a general right of sale, and may sell on credit, ... 220, 221
The pledgee may not use; his interest does not ripen by time, ... 222
Care Required of the Pawnee, ... 223
The rule laid down by Bracton, ... 223, 224
The pawnee of a note may collect, but not compromise, ... 225
The pawnor may assign, but cannot recover on the note till the lien is paid, 225
Conversion of the pledge, ... 226
A delivery for a special purpose, ... 226, 227

PAGE.
Presumption of negligence, ... 227
Losses by theft; the rule as to care and diligence, ... 228
The right to stipulate for a restricted liability, ... 229
A sale of pledge without notice, ... 230
A contract, how affected by the usage of trade, ... 230, 231
If bailee break his contract, he loses his lien, ... 231
A sale of stock pledged; an accord, ... 232
Payments, how applied when there are several debts, ... 233
Proceeds of sale of pledge, how applied, ... 234
The pledge does not suspend right of action, ... 234, 235
The pledgee on a sale receives the proceeds, ... 236
A surety, how protected, ... 237
EXPENSES, BY WHOM BORNE, ... 237, 239
ACCESSORIAL THINGS, ... 239
The hirer for a term acquires the increase of a flock, ... 240
But the pledgee does not, ... 241
PARTIES. Capacity to contract, ... 242
Rights of married women as to their separate estate, ... 243
CONTRACT, WHEN VOID, ... 244
The pledge auxiliary to the principal debt, ... 244
Effect of giving a pledge for an usurious debt, ... 244
Our statutes prohibiting usury, ... 245
Cases illustrating the law, ... 246, 247
A pledge upon condition, ... 247
SALE OF PLEDGE, WHEN AND HOW MADE, ... 248 – 262
The pledge may be sold judicially and on notice, ... 248
Must be on personal notice, ... 248, 249
A chattel mortgage may be foreclosed in like manner, ... 249
The pawnor has a legal remedy for the pledge, when, ... 250
A judicial sale, when advisable, ... 250
A demand necessary before sale, ... 250, 251
Difference between the mortgage and pledge of goods, ... 251, 252
Assignment of principal debt, effect of, ... 253
The mortgagee of goods acquires title, when, ... 253
What a reasonable notice of sale, ... 253, 254
The power of sale, how executed, ... 255
The right to sell on execution the pawnee's interest, ... 255, 256
The pawnee's duty to sell for benefit of another, ... 256
The mortgagee's duty in like case, ... 256, 257
Pledges under Code of Louisiana, ... 257
Our statutes as to sales, pledges and assignments of personal property, 257, 259
Foreclosure and notice, ... 259
A conversion of the pledge, does not release the original debt, ... 260
The pledge cannot be made irredeemable, ... 260
The pledgee cannot purchase on the sale so as to acquire title unless, &c., 260, 261
Pledgee's right to collect, how qualified, ... 261
An appropriation of the pledge a payment so far, ... 261
RESTITUTION, ... 262 – 273

PAGE.
A discharge of the original debt discharges the pledge, ... 262
The interest, right to, ... 262, 263
Payment on an usurious debt, effect of, ... 263
A pledge to pay it, ... 264
Failure to restore, a surety, ... 264, 265
Cumulative security, ... 265
The contract of pledge annulled, when, ... 266
The owner divested of his title, when, ... 266, 267
The pawnee must restore the profits of pledge, ... 268
Statute of limitations, ... 268, 270
The doctrine of merger, ... 271, 272
Transfer of title by sale, by recovery, ... 272

CHAPTER VI.

CONTRACTS FOR HIRE.

TTis species of bailment mutually beneficial, ... 274
It is a hire or purchase of the use, ... 274
Our law on the subject, whence derived, ... 275
Classes of contracts for hire, ... 275, 276
HIRE OF DEPOSIT, ... 276
This kind of bailee answerable for ordinary neglect, ... 276, 277
The rule, how applied; in cases of agistment, ... 278
The rule of the civil law; its flexibility, ... 279
In general the bailee has no lien, ... 279, 280
Duties of the factor and his privileges, ... 280, 281, 282, 283
WAREHOUSE-MEN, are bailees for hire, ... 284
Their liability and rights; case of a carrier, ... 285, 286
When a delivery by a carrier to a warehouse-man good, ... 286, 288
To pay charges when; effect of mistake in the delivery, ... 286, 287
Effect of a sale of goods in the warehouse, ... 287
A conditional delivery. Weight of proof in case of loss, ... 287, 288
The bailee may be held to bail, when, ... 289
The contract controlled by custom, when, ... 289
A sale when presumed, ... 289, 290
Debts payable in specific articles, ... 290, 291
When the warehouse-man's duties begin, ... 291, 292
An agreement to forward goods, ... 293
Storage by a common carrier; by a warehouse-man, ... 294, 295
Limiting liability by contract, ... 296
WHARFINGERS, who are; duties, and delivery to, ... 297, 299
Are not common carriers, ... 298
Not answerable for loss by fire, ... 299
Must answer for their servants, ... 300
Delivery of a wharfinger, ... 300
Liable for ordinary care, ... 301
Contract to forward goods, ... 302, 303

PAGE.
Effect of custom in regulating the delivery, ... 303
Forwarding and commission merchants, duties of, ... 304
Evidence of Loss, ... 304
The bailor in the first instance proves the contract and delivery, ... 305
Loss of papers, how proved; contents of lost trunk, ... 305
The bailee cannot dispute his principal's title, ... 306
The Lien of Wharfingers and Warehouse-men, ... 307, 308, 309
Hire of Things, ... 309
The hirer acquires a possessory interest, ... 309, 310
Distinction between executory and executed contracts, ... 311
Obligations of letter to hire, ... 311, 312
The engagements of the hirer, ... 312, 313
The like when an infant hires a chattel, ... 313
Contract of hire for a term, ... 314
Liability in respect to Servants, ... 315 – 320
The employer is answerable for his servants, ... 315, 316
He is liable on the principle that *qui facit per alium facit per se*, ... 316, 317
Exception to the rule, ... 318
He is not answerable for his non-feasance, nor for his willful acts, ... 318, 319
Burden of Proof, ... 320, 321
Bailor must prove the allegations in his complaint, ... 322, 323
Proof when the bailee has violated his contract, ... 322
Failure to return, effect of, ... 323
Accession, by the wrongful act of bailee, ... 324
The increase of a flock accrues to the bailee, ... 324
An exception as to slaves, &c., ... 324, 325
Use of the thing hired, ... 326 – 331
Must be in the time and manner agreed on, ... 326 – 328
Hired slaves, how used, ... 328, 329
Cases illustrative of the rule, ... 329, 330
Once liable, he cannot evade his liability, ... 331
Termination of the Contract, ... 331 – 338
It is terminated when executed, or rendered impossible, ... 331, 332, 335
Mode and place of return, ... 333, 334, 335
It is ended by a loss or destruction of thing bailed, ... 335, 336
The rule as to hired slaves that die during the term, ... 336, 337, 338
Hire of Labor and Services, ... 338
This contract includes all bailments for hire, ... 338
Nature of the contract, ... 339, 340
Bailor's right of Property, ... 340
Goods ordered to be made, who the owner of, ... 340, 341
The rule illustrated by cases, ... 342, 343
The case of shipbuilding, the English rule, ... 344, 345, 346
Delivery, what amounts to, ... 347
The statute of frauds does not apply, ... 347, 348
The title to the thing ordered does not pass, ... 348
Cases in reference to the statute of frauds, ... 349, 350, 351
An article bailed for repair, title to it, ... 352, 353

PAGE.
BAILEE'S RIGHT OF PROPERTY, ... 353 – 356
The bailee has an interest to the extent of his lien, ... 354
But he has no lien till his work is done, ... 354
His interest where he does work on shares, ... 354, 355
His lien upon a part for the whole, ... 355
Has an insurable interest, ... 356
LOSS, BY WHOM BORNE, ... 356 – 358
The owner of the property bears the loss, ... 356, 357
And in some cases the bailee loses his labor, ... 357
But not as a general rule, ... 358
HIRE OF LABOR AND SERVICES GENERALLY, ... 358
The workman has no pay where he does no valuable service, ... 358, 359
Case of a surveyor, ... 359
Must perform strictly, ... 359
An infant may rescind his contract, effect of, ... 360
Performance a condition precedent to a recovery, ... 360
Completion after time agreed on, effect of, ... 361
Hire of services for a given time; harsh language does not rescind the contract, ... 361, 362
Action for repairs under a special contract, ... 362, 363
Deviation from terms of agreement, ... 363
The terms control notwithstanding a mistake of fact, ... 363, 364
Special agreement for compensation by will, ... 364
When no promise to pay for services implied, ... 364, 365
Delivery of an article made to order, ... 365
Effect of delay caused by employer, ... 365, 366
Waiving contract; a *quantum meruit*, ... 365, 366
Using better materials than stipulated for, ... 366
Waiving contract under seal, implied promise, ... 367
Services of a counselor at law, ... 367, 368
Services of an attorney, recovery for, when, ... 368, 369
Must show a retainer; employment, ... 369
Voluntary services, gratuitous, ... 370
CARE DEMANDED, ... 371 – 375
The same degree of care required of every bailee for hire, ... 371
The bailee bound to exert himself, ... 371, 372
Bound to answer for his servants, ... 372
Right of compensation after loss, ... 373
Care, how measured, ... 373
Bailor must show negligence, ... 374
Loss by internal decay, robbery, theft, fire, &c., ... 374, 375
DEGREE OF SKILL REQUIRED, ... 375 – 380
Implied engagement for skill, and for its use, ... 375, 376
Skill, how measured; professional skill, ... 376, 377, 379
Non-feasance, action for, when sustained, ... 377, 379, 380
When no stipulation for skill, ... 378
FULFILLMENT OF THE CONTRACT, ... 380 – 385
When contract for hire fulfilled, ... 380, 381

PAGE.
Risk of loss; total destruction, effect of,..... 381
Special contract for reward for services,..... 382, 383
Reduction of damages, when and how made,..... 383, 384
Terms of contract to be fulfilled; deviation,..... 384, 385
Delay caused by employer,..... 385
Lien for labor and services,..... 386, 387

CHAPTER VII.

OF INNKEEPERS.

The business of innkeeping not a franchise,..... 388
The right to retail spirituous liquors is a franchise,..... 388
Chartered rights of cities and villages to grant licenses,..... 388, 389, 390
Not vested rights as against the state,..... 389
The towns have same rights as cities and villages,..... 389, 390
The excise law not a mere revenue act,..... 390
Penalties imply prohibition, when,..... 390
Inns and taverns are the same,..... 390, 391
A tavern and coffee-house is an inn,..... 391, 392
A hotel is an inn,..... 391
Innkeeper liable just the same though not licensed,..... 392
The license to keep a tavern, &c., a personal trust,..... 392, 393
Right to elect a tavern keeper a justice, how disqualified,..... 392, 393
Guests, who are deemed such,..... 393–397
All persons entertained as such are guests,..... 393
If a guest leave at an inn his horses, he remains a guest,..... 394
One hiring lodgings for a time specified not a guest,..... 394
Inns established for travelers,..... 394, 395
Who may be a guest,..... 395
Case of sending or leaving horse and carriage at an inn,..... 396
What constitutes one a guest,..... 397
What a Delivery to an Innkeeper,..... 398
Special delivery not necessary,..... 398, 399
Goods deposited by request of guest in a particular room, effect of,..... 398
Money not delivered,..... 399
Delivering to guest the key of his room, effect of,..... 399
The delivery must be to innkeeper's custody,..... 399, 400
Goods must be deposited as directed by innkeeper,..... 400
Hotels, recent statute relative to, its construction,..... 401, 402
Responsibility of Innkeepers,..... 402–408
General rule of liability, its rigor necessary,..... 402, 403, 414
Analogy with common carrier,..... 403, 404, 405
The innkeeper liable for negligence, for theft, &c.,..... 404
May dictate as to mode of receiving goods,..... 405
When not answerable,..... 405
May contract for limited liability,..... 405, 406
Not absolutely liable for all losses except act of God, &c.,..... 406, 407

PAGE.
When his liability begins and ends, his lien, ... 407
Liable for losses by robbery, theft, &c., ... 407, 408
INNKEEPER'S DUTY TO RECEIVE GUESTS, ... 408 - 410
Bound to receive when he has room, ... 408
May be prosecuted civilly and criminally for refusal, ... 408
Must receive all persons on same terms, ... 409
A tender of reward, when necessary; to be alleged, when, ... 409
Indictable as a nuisance, when, ... 410
Innkeeper's right to appoint the guest his room, ... 410
His house is public, to what extent, ... 410
INNKEEPER'S LIEN, ... 411 - 414
Has a lien on his guest's goods only, ... 411
A traveler deemed a guest, when, ... 411, 412
No lien on goods received from a neighbor, ... 412
Effect of giving credit, ... 412, 413
Title to the property not material, ... 413
Extent of the lien, ... 413
The lien does not imply a right to sell, ... 414
STATUTE REGULATIONS, ... 414 - 419
Principle of general liability, shown by an old chronicle, ... 414
The license system, created by statute, ... 415
Our Revised Statutes; the license, ... 415, 416
History of inns and hotels, note, ... 417
Recent prohibitory statute, substance of, ... 417 - 419
WHAT WILL EXCUSE THE INNKEEPER, ... 419 - 423
Neither sickness nor absence will excuse, ... 419, 420
The custody of the goods a part of the contract, ... 420
Innkeeper not answerable when he does not receive, ... 421
Effect of a special contract, ... 421
The common law applies in all the states, ... 421, 422
The guest may give evidence for himself, when, ... 422, 423

CHAPTER VIII.

COMMON CARRIERS.

Nature of the subject, ... 424, 425
WHO ARE COMMON CARRIERS, definition, ... 425, 426
Those who carry for all persons for hire are such, ... 425
Must carry for hire and as a business to be such, ... 426, 427
When engaged in the business, delivery to agent, effect of, ... 427
The passenger carrier is a common carrier of baggage, ... 427, 428
Distinction between them, ... 428
Kent's definition of common carriers, ... 428
Steamboats towing other boats not carriers, ... 428
A cartman is not a common carrier, ... 429
Per contra, a case; reason of the rule, ... 429, 430
The wagoner is a common carrier, when, ... 430, 432

PAGE.
Proprietors of stage coaches are, when and how far, ... 432
Are common carriers of baggage, ... 433
And cannot by notice evade their liability, ... 433
When common carriers of money, ... 434, 435
As carriers of passengers they are not liable as common carriers, ... 434
Masters of vessels are common carriers, ... 435 – 437
They are liable on their contract, ... 435, 436
They are liable to same extent but not jointly with the owners, ... 436, 437
Owners of vessels are common carriers, ... 437 – 443
They are such at sea, and on inland waters the same, ... 437
The employment of a vessel determines its character, ... 438, 439
It is a common carrier when employed as such, ... 438
The master's authority implied from his position, ... 439
This implication is repelled, when, ... 440
A general ship, what, ... 440, 441
The nature of the business determines who are carriers, ... 441
The form of action not material, ... 442
Contracts to carry as common carriers, ... 442, 443
Duty of the Carrier to Receive, ... 443 – 446
Bound to accept goods for carriage, when, ... 443
Not in an unusual manner, ... 444
Having room, is bound to receive and carry, ... 444, 445
The rule is the same as to passenger carriers, ... 445, 446
Delivery to the Carrier, what is, ... 446 – 454
To charge the carrier there must be a delivery to him, ... 446, 451
His liability begins from the delivery, ... 447
Delivery on wharf, how made, ... 447, 448
The act of loading is the carrier's act, ... 447
Delivery to him as a forwarding merchant, ... 449
He becomes a forwarder, when; booking goods, ... 449, 450
The manner not material, if carrier receive the goods, ... 450
Neither is the time material, ... 450, 451
Receiving goods to carry in particular manner, effect of, ... 451
The delivery must be fairly made and into carrier's custody, ... 452, 453
Delivery on the dock must be with notice, ... 453
Responsibility of Carriers, ... 454
By general custom; grounds of liability, ... 454
Exceptions; act of God, what, ... 454
Inevitable accident not the same thing, ... 455
The carrier is answerable for accidents, ... 455, 456
And for a mistake of fact, ... 456
For every act, except, &c., ... 456
Stated affirmatively; the rule illustrated, ... 456, 457, 458
A loss not attributable to act of God, when, ... 458, 459
The act of God, causing loss, affects carrier, ... 459
He loses his freight, ... 460
Loss in a deviation from the route, who to bear, ... 460, 461
Special contracts prevail over usages, when, ... 461

PAGE.
Acts of God, perils of the sea, and inevitable accidents, are not the same, ... 461, 462
How far liable after an act of God, ... 462
The question of liability, how resolved, ... 462
Fires kindled by lightning, acts of God, others not, ... 462
Public Enemies, loss by, ... 463,
Who are public enemies, ... 463, 464
Rioters and robbers are not; pirates are, ... 463
Property captured, title how charged, ... 463, 464
The carrier to excuse himself need not show change of title, ... 464
The carrier must answer for the goods with the exceptions mentioned, ... 465
He is regarded as an insurer, ... 465
His employment is public, and his duty declared by law, ... 466
He is liable independent of his contract, ... 467
His implied agreement to provide safe carriages, ... 467, 468
Special Contracts, ... 468 - 490
Right to make a special contract, bills of lading, ... 468, 469
Being bound to accept, cannot impose terms, ... 469
Public Notices, ... 469 - 490
Notices, effect of in cases of concealment, ... 470
Fraud and deception, ... 471, 472
When contents of packages to be disclosed, ... 472
Notices entering into agreement, ... 472, 473, 474
Nature and design of notices, ... 474
Construction of notices, ... 474, 475
The office of notice in cases of fraud, ... 475
Course of English decisions on the subject, ... 475 - 482
Departure from common law, ... 476, 477
The doctrine of notice regretted, ... 477, 478
The decisions become more strict on the subject, ... 478, 479
The carrier required to make his terms known, ... 479
His duties; the variety of notices given, ... 480
Result in a statute, the carrier's act, ... 480, 481
The ground of the statute, ... 480, 482
Decisions under it, ... 482, 483
Bound to carry, may contract for limited liability, ... 483, 484
Notices annulled; never favored, ... 484
The doctrine as to notices in this country, ... 484, 485
Not to be deemed part of the contract, ... 485, 487
Restricted in their effect, ... 488
No contract implied conformable to terms of notice, ... 488 - 490
Bill of Lading, form of, ... 490
A contract and a receipt; an exception part of it, ... 490
A change in form of the exception, ... 491
An exception of "dangers of the seas," not made formerly, ... 491
Exceptions in the bill, how construed, ... 492, 493
The bill of lading cannot be contradicted, ... 494
The exception does not change burden of proof, ... 494

PAGE.
Exceptions of the dangers of rivers and lakes, ... 492–495
The exceptions used in English form of bill, ... 495
The perils of the sea cover unavoidable misfortunes, collisions, ... 496
Loss by capture, by perils of the sea, ... 496, 497
Perils of the sea, under insurance policies, construction of, ... 497, 498
When carrier to show his vessel sea-worthy; proximate cause, ... 498
Negligence by third persons, covered by insurance, when, ... 498
Master's right to sell cargo, ... 499
The master bound by terms of the bill; its assignment, ... 499
Right of consignor over bill 500
Right of consignee receiving it for advances, ... 500
Right to recover freight from consignee, ... 500, 501
When also from consignor; freight when earned, ... 501
Right to *pro rata* freight, ... 501, 502
Special contracts of charter-party, ... 502
CARRIAGE OF GOODS, duties connected with, ... 503
Mode of receiving, carrying and delivering goods, ... 503, 504
Contracts to carry beyond his route, ... 504, 505
When his duty ends, ... 505, 506
When it begins; intermediate carriers, ... 506–508
Local usage as to mode of delivery, ... 508, 509
Jettison and general average, ... 509
Effect of settlement of general average, ... 510
Goods on deck; effect of clean bill, ... 510
Effect of usages on contracts, ... 510–512
Jettison must be justified by necessity, ... 512
Receiving goods to be carried on deck, effect of, ... 513
Loss of goods, improperly so laded, by lightning, ... 513
DELIVERY BY THE CARRIER, ... 513
Cannot commit delivery to another, ... 514
Duty to deliver, qualified by circumstances, ... 515
Warehousing; usage of trade, ... 515, 516
Mode of delivery, by ships and railroads, ... 515
Railroads, when depositaries, ... 516–518
Delivery by railroad to next carrier, ... 518
When carrier not answerable for act of delivery, ... 518
Constructive delivery, or waiver of, ... 519
Delay of delivery, when excusable, ... 519, 520
Railroad act; a case of necessary delay, ... 519, 520
Burden of showing delivery rests on carrier, ... 520, 521
Special contract to deliver safely, ... 521
Landing on wharf with notice, a delivery when, ... 521, 522
Delivery must be reasonable as to time, place, manner, ... 521
Carrier must find consignee; his duty if he cannot, ... 521, 522
Must store the goods, how and with whom, ... 522
Duty of master, if consignee refuse to receive, ... 522, 523
The bailee of lumber on a river, his duty, ... 523
Reasonable delay, what is, cases, ... 523–525

PAGE.
Freezing of rivers, stress of weather, embargoes, &c., ... 523, 524
Arrest but do not annul the contract, ... 523, 524
Distinction between lawful and unlawful act of government, ... 524
An action for delay, ... 525
Negative decisions illustrate the rule, ... 525
Delay caused by low water an excuse, how long, ... 526
Offer to deliver, effect of; specie how delivered, ... 526
An usage as to mode of delivery must be proved, ... 526
Failure to come and receive within reasonable time, ... 527
Delivery of goods arriving in the evening, when to be made, ... 527
Duty in saving goods after an inevitable accident, ... 527
Duty in storing or forwarding goods at the end of route, ... 527, 528
Delivery to succeeding carrier, ... 529 – 531
Delivery from vessels arriving from foreign ports, custom, ... 531 – 533
The custom, when appealed to, ... 534
The carrier not to dispute his employer's title, ... 535, 539
Right of stoppage *in transitu*, ... 535 – 539
THE CARRIER'S HIRE OR REWARD, ... 540 – 547
In reference to his responsibility, ... 540
His right to demand prepayment, ... 541
Special agreement for, ... 542, 543
Who bound to pay freight, ... 542 – 544
Effect of an assignment of bill of lading, ... 543, 544
Pro rata freight, when due, ... 545 – 547
CARRIER'S LIEN, ... 547 – 552
It is specific and favored by courts; others not favored, ... 547, 548
Waived, when, ... 548 – 550, 551
REMEDIES AGAINST THE CARRIER, ... 552 – 577
For not receiving goods offered for carriage, ... 552, 553
Remedy against carrier in admiralty, ... 553
Usual remedy on contract and for tort, ... 554, 555
ACTION ON THE CASE, against carrier, ... 555 – 559
Convenience of this action, ... 557
ACTION ON THE CONTRACT, against carrier, ... 559 – 561
Pleadings in, ... 560, 561
PARTIES TO THE ACTION, ... 561 – 565
The owner brings the action, ... 561
The consignee presumed the owner, ... 562, 563
The owner liable for freight and the person receiving the cargo, ... 562, 564
The implied contract is with the owner, ... 564
BURDEN OF PROOF, ... 565 – 570
The pleadings show where it lies, ... 565
Proof required in the action; negative proof, ... 566
Presumptions against the carrier; against others, ... 567
In cases of special acceptance; exceptions, ... 568, 569
Under statutes, ... 570
DAMAGES, how estimated, ... 570 – 572
EXCEPTIONAL CASES, ... 572 – 577

PAGE.
English railway cases, ... 572, 573
Carriage of live stock, ... 572 – 576
Carriage of slaves; towing boats, ... 573, 574
Railroad corporations, common carriers by statute, ... 575

CARRIERS OF PASSENGERS.

The common carrier of passengers bound to receive and carry, ... 577 – 580
Right to make regulations and preserve order, ... 578, 579
Payment of Fare, ... 580 – 583
Right to prepayment; fare covers baggage, ... 580, 581
Railroads bound to check baggage; tickets, nature of, ... 581, 582
Putting off passengers, for not paying fare; lien, ... 582
Right to freight from owner, when he is not the bailor, ... 582, 583
General Liability, rule of, ... 583 – 586
Passenger-carriers bound for the utmost care, ... 583, 585
Coaches must be Road-worthy, ... 586 – 591
Railroad companies bound by same rule, ... 587 – 590
Competent Skill, agreement for, ... 591 – 594
And for its exercise, ... 591, 592
A partnership, what, ... 593, 594
Law of the Road, ... 594 – 599
By statute, ... 595
By custom; in cities and villages, ... 596 – 599
Duties by the Way, ... 600 – 602
To stop at usual places, ... 600
Towards disorderly persons, ... 601
Giving notice of danger, ... 601, 602
Passenger Carriers by Water, ... 602 – 618
Bound by same general rule, ... 602
Overloading; explosions of steam, effect of, ... 603
Violation of statutes, effect of, ... 604
Duty in passing other boats; and to carry lights, ... 604, 605, 610
Duty to carry lights, by statute, ... 604, 605
Duty to carry lights, by custom, ... 605 – 607
To use utmost vigilance to avoid collision, ... 605, 606
Lights necessary when vessels are at anchor, ... 606, 607, 608
Trinity-House regulations, nature of, ... 607, 608, 610
Rules of navigation, ... 609 – 614
Usage of the sea, laws of custom, ... 610
In meeting and passing, ... 610 – 612
Liability in cases of collision, ... 614
In landing passengers, ... 615
In carrying emigrant passengers; penalties, ... 615 – 618

TABLE OF CASES CITED.

A.

Acker v. Campbell, ... 130
Ackley v. Finch, ... 191, 201, 252, 264
Ackley v. Kellogg, ... 449, 505
Adams v. Lindsell, ... 123
Against Jackson, ... 431
Agle v. Atkinson, ... 87
Ainsley v. Wilson, ... 131
Albatross v. Wayne, ... 534
Albin v. Presby, ... 400
Alcorn v Harmonson, ... 370
Allen v. Allen, ... 324
Alexander v. Southey, ... 318
Allison v. Mathieu, ... 267
Allen v. Williams, ... 219
Allen v. Dykers, ... 197, 204, 230, 252
Aldrich v. Albee, ... 180
Allen v. Merchants' Bank, ... 112
Alexander v. Greene, ... 70, 229
Alger v. Weston, ... 392
Amies v. Stevens, ... 168, 456
Amos v. Temperly, ... 543
Ansell v. Waterhouse, ... 467
Andrews v. Smith, ... 271
Angus v. Dickerson, ... 322
Andrew v. Dieterick, ... 93
Andrews v. Durant, ... 345
Anonymous v. Jackson, ... 469
Anjou v. Deagle, ... 453
Appleby v. Dodd, ... 335
Armory v. Delamirie, ... 65, 83, 88
Armory v. Flin, ... 56, 90
Arnold v. Hallenbake, ... 441
Aspenall v. Pickford, ... 548
Ashley v. White, ... 48
Aston v. Heaven, ... 435, 583
Ash v. Putnam, ... 160, 269
Atkinson v. Manks, ... 84
Atkinson v. Bell, ... 341
Atkin v. Berwick, ... 157
Atwoood v. Reliance Trans. Co., ... 484
Austin v. The Manchester & S. R. Co., ... 572
Aymar v. Astor, ... 437

B.

Baldwin v. Cole, ... 56, 129
Barker v. Miller, ... 62
Bank of Utica v. McKinster, ... 112
Bayon v. Prevot, ... 115
Bates v. Conkling, ... 180, 264
Barret v. Warren, ... 130
Barker v. Russell, ... 183, 554
Barrow v. Paxton, ... 191, 196, 201, 249, 252
Batterman v. Pierce, ... 178, 232
Baker v. Wheeler, ... 180, 187
Babcock v. Gill, ... 187, 341
Badlam v. Tucker, ... 204, 261
Bailey v. Burton, ... 205, 209
Bank of Rochester v. Jones, ... 219, 280, 499
Bailey v. Ogden, ... 220
Bank of Chenango v. Hyde, ... 235
Ball v. Marvin, ... 242
Barnes v. Foley, ... 286, 509
Barry v. Longmore, ... 307
Barnes v. Graham, ... 310
Baylies v. Fisher, ... 332
Baylis v. Usher, ... 333
Bartholomew v. Jackson, ... 370
Batson v. Donovan, ... 445, 471
Barnes v. Cole, ... 505
Bastard v. Bastard, ... 557
Barker v. Havens, ... 501
Barker v. Cheriot, ... 502
Barber v. Brace, ... 513
Baldwin v. Cole, ... 554
Barber v. Rose, ... 361
Baker v. Langhorn, ... 281
Bank of St. Albans v. Gilliland, ... 195, 234
Bay v. Bogert, ... 268
Bank of U. S. v. Macalister 73
Beardsley v. Richardson, ... 34, 95, 105, 129
Betts & Church v. Lee, ... 78
Berley v. Taylor, ... 115, 122
Bergen v. Bennet, ... 126
Beardsley v. Root, ... 131
Beers v. Culver, ... 148
Beach v. Fulton Bank, ... 269
Beach v. Vandewater, ... 176
Beach v. Owen, ... 182
Benners v. Ex'rs of Howard, ... 182
Bemus v. Beekman, ... 217
Bell v. Palmer, ... 280
Bellows v. Denison, ... 324
Bell v. Reed, ... 331, 467, 498
Bennet v. Hull, ... 348
Bement v. Smith, ... 365
Beedle v. Morris, ... 394
Bennet v. Mellor, ... 397
Bean v. Sturtevant, ... 435
Beck v. Evans, ... 451
Beekman & Johnson v. Shonse, ... 484
Beekman v. S. & S. R. Co., ... 577
Bennett v. Dutton, ... 443, 577
Bixby v. Whitney, ... 180
Bissell v. Drake, ... 212, 225
Biles v. Holmes, ... 325
Birch v. Liverpool, ... 351
Bishop v. Pentland, ... 498
Bickett v. Willan, ... 476
Bigelow v. Heaton, ... 549
Blanchard v. Ely, ... 177
Blackwell v. Ellsworth, ... 205
Blandy v. Allen, ... 215
Blackstone Bank v. Hill, ... 233
Blood v. Humphrey, ... 243

Blake v. Nicholson, ... 278, 552
Blin v. Mayo, ... 301
Blade v. Noland, ... 305
Bleadon v. Hancock, ... 308
Blanchard v. Isaacs, ... 425
Blake v. Baxendale, ... 525
Bonny v. Amee, ... 196
Bonlon's Case, ... 71
Bond v. Ward, ... 82
Boncher v. Lawson, ... 489
Boyle v. M'Laughlin, ... 459
Bodenham v. Bennett, ... 476
Bondret v. Hentigs, ... 497
Bostwick v. Champion, ... 594
Bourne v. Gatliff, ... 522
Bowman v. Teall, ... 519
Bohn v. Headley, ... 524
Boyce v. Brown, ... 133
Bowman v. Teal, ... 168
Bowie v. Napier, ... 214
Boyd v. Hitchcock, ... 232
Bovan v. Waters, ... 307
Boson v. Sandford, ... 816, 467, 556
Boyce v. Anderson, ... 428, 573
Boydell v. Drummond, ... 351
Bracket v. M'Nair, ... 570
Bracegirdle v. Heald, ... 351
Bray v. Mayne, ... 374
Brandt v. Bowlby, ... 571
Bretherton v. Wood, ... 555
Bremner v. Williams, ... 587
Brigham v. Rogers, ... 484
Brislin v. Royd, ... 125
Bringloe v. Mauriee, ... 133, 158
Bristow v. Eastman, ... 146
Bristol v. Wilsmore, ... 160
Brig Sarah Ann, ... 200
Brinde v. Dale, ... 229
Bromley v. Holland, ... 269
Brooks v. Hubbard, ... 290
Brook v. Pickwicke, ... 433, 466
Brown v. Denison, ... 294, 449
Brown v. Cook, ... 60, 83, 89, 145
Brown v. Maxwell, ... 318
Brown v. Duncan, ... 390
Brown v. Quilter, ... 338
Brown v. Taber, ... 148
Brown v. Saxe, ... 187
Brown v. Bement, ... 191, 249
Brown v. Hotchkiss, ... 88
Brown v. Treat, ... 116
Brownell v. Hawkins, ... 261
Brownell v. Flagler, ... 377, 599
Browning v. Hanford, ... 59, 61
Browcher v. Noldstrom, ... 319
Broughton v. Whallen, ... 150
Bryan v. Nix, ... 500
Bryce v. Brook, ... 280
Bullock v. Babcock, ... 50
Bushforth v. Hadfield, ... 59, 230
Burke v. Trent, ... 59
Bursley v. Hamilton, ... 63
Burnett v. Lynch, ... 110
Burton v. Hughes, ... 142, 151, 158
Butler v. Rose, ... 178
Buffum v. Meny, ... 186, 231
Buller v. Harrison, ... 194
Bullard v. Billings, ... 196
Butterfield v. Baker, ... 196
Butler v. Van Wyck, ... 259
Buffington v. Gerish, ... 268
Bush v. Lyon, ... 270, 279
Butler v. Miller, ... 271
Buckley v. Packard, ... 282
Bush v. Miller, ... 285
Buckman v. Levi, ... 299
Burton v. Wilkinson, ... 306
Bush v. Steinman, ... 317
Burlingame v. Burlingame, ... 351
Burdick v. Murray, ... 355
Burgess v. Clements, ... 399
Bussey v. Donaldson, ... 437, 612
Buddle v. Wilson, ... 467
Buller v. Fisher, ... 496
Buskirk v. Purrington, ... 583
Butterfield v. Forrester, ... 597
Buckley v. Furniss, ... 536
Burgess v. Gun, ... 547

C.

Cary v. Hotalling, ... 50, 64, 160
Campbell v. Stakes, ... 51, 145, 161, 166
Callendar v. Oelrichs, ... 106
Carrington v. Smith, ... 196
Carr v. Lancashire & Y. R. Co., ... 573
Carrigues v. Coxe, ... 491
Campbell v. Morse, ... 456
Camp v. Camp, ... 220
Carpue v. London & B. R. Co., ... 587
Carroll v. The New-York & N. H. R. Co., ... 590
Carsley v. White, ... 605
Causey v. Yates, ... 244
Camden. &c., Co., v. Burke, ... 428, 503
Cayle's Case, ... 392
Carruthers v. Payne, ... 346
Cathan v. Moore, ... 321
Case v. Boughton, ... 262
Caton v. Rumney, ... 229, 574
Caldwell v. Murphey, ... 586
Chamberlain v. Chandler, ... 617
Chapman v. Clough, ... 284
Chapman v. Black, ... 246
Chipman v Martin, ... 271
Chapman v. Allen, ... 280
Chenowith v. Dickinson, ... 304
Chamberlain v. Gorham, ... 305
Chew v. Gary, ... 325
Christie v. Griggs, ... 428, 583
Champlin v Butler, ... 385
Chorley v. Boleot, ... 367
Chace v. Wetmore, ... 355
Christian v. Grigg, ... 434
Chaplin v. Hawes, ... 597
Chesterfield v. Jansen, ... 71
Charnley v. Whinstanley, ... 127
Childs v. Hart, ... 133
Church v. Sanders, ... 146
Chambers v. Winn, ... 182
Chandler v. Windship, ... 182
Chandler v. Belden, ... 552
Chandler v. Talbot, ... 541
Chickering v. Fowler, ... 485
Cheeney v. Halley, ... 494
Chase v. Westmore, ... 551
Citizen's Bank v. The Nantucket S. Co., ... 426
Clark v. Bush, ... 263
Clark v. Shee, ... 267
Clark v. Bull, ... 269
Cleverly v. Brackett, ... 270
Clark v. Rowling, ... 271
Clarke v. Spencer, ... 288
Cliffe v. Danvers, ... 295
Clark v. Spence, ... 301, 305
Clark v. Poozer, ... 321
Clark v. Eamshaw, ... 339
Clayton v. Andrews, ... 343
Clark v. Mayor, &c., of New-York, ... 363
Clayton v. Per Dun, ... 393
Clark v. Grey, ... 438, 561
Clark v. Faxton, ... 434
Clute v. Wiggins, ... 397
Clark v. Smith, ... 385
Clarkson v. Edes, ... 550
Clarkson v. Coles, ... 541
Clay v. Willan, ... 470
Claxton v. Swift, ... 187
Clark v. Pinney, ... 182, 198, 290
Clark v. The Brig Dodge Healy, ... 58
Clark v. Hutchins, ... 443
Clark v. McDonald, ... 578
Cooper v. Barton, ... 323
Colt v. Houston, ... 333
Corlies v. Widdifield, ... 282
Coon v. S. & U. R. R. Co., ... 318
Cooper v. Elliston, ... 348
Collins v. Forbes, ... 382
Cole v. Goodwin, ... 431
Collman v. Collins, ... 583

Cotterill & Wife v. Starkey, ... 593
Coppin v. Braithwaite, ... 601
Comstock v. Smith, ... 239
Cooper v. Kane, ... 59, 231
Commercial Bank v. Hughes, ... 66
Coggs v. Bernard, ... 70, 94, 97, 120, 188
Commonwealth v. Morse, ... 92
Cook v. Bradley, ... 106
Coddington v. Bay, ... 119, 234
Conrad v. Atlantic Ins. Co., ... 119, 280, 544
Copeland v. Mer. Ins. Co., ... 127
Conway v. Bush, ... 134
Colt v. McMecken, ... 169, 457
Cortelyou v. Lansing, ... 189, 196, 201, 248
Collins v. Martin, ... 193
Colt v. Lesnier, ... 194
Commercial Bank v. Kortright, ... 198
Covill v. Hill, ... 217
Corlies v. Cumming, ... 221, 232
Cook v. Gourdin, ... 441
Cobban v. Dounc, ... 447
Cory v. Little, ... 55
Colepepper v. Good, ... 449
Cook v. Champlain Trans. Co., ... 557
Cook v. Howard, ... 464
Cope & al v. Cordova, ... 490, 532
Cock v. Taylor, ... 543
Coleman v. Lambert, ... 543
Corbett v. Packington, ... 560
Coxe v. Harden, ... 563
Commonwealth v. Power, ... 579
Coates v. Railton, ... 586
Covill v. Hitchcock, ... 588
Crawshay v. Eades, ... 589
Creery v. Holley, ... 510
Crane v. The Rebecca, ... 331
Crosby v. Fitch, ... 440
Craft v. Alison, ... 319
Cross v. Andrews, ... 394
Crawshay v. Homfray, ... 355
Crookshank v. Burrell, ... 348
Crafts v. Waterhouse, ... 585
Crippen v. Culver, ... 147
Curtis v. Grant, ... 187
Cuming v. Brown, ... 499
Cumberland v. Codington, ... 116, 194
Curtis v. Groat, ... 132
Curtis v. Drinkwater, ... 586
Cutler v. Powell, ... 335
Curtis v. State of Ohio, ... 392

D.

Davis v. Garrett, ... 329
Dacy v. The Chemical Bank, ... 146
Dale v. Hall, ... 442
Dansett v. Wade, ... 494
Dartnal v. Howard, ... 107
Daubigny v. Duvol, ... 118, 211
Davis v. Garrett, ... 329, 513
Davis v. James, ... 562
David v. Moore, ... 422
Davenport v. Tarlton, ... 240
Davis v. Anable, ... 271
Dawes v. Peck, ... 562
Dawson v. Kittle, ... 59, 230, 289
Dawson v. Chamney, ... 404
Day v. Leal, ... 235, 271
Day v. Ridley, ... 566
Dean v. Keate, ... 320
De Bagnis v. Armisted, ... 390
De Fonclear v. Shottenkirk, ... 89, 107, 186
Defreeze v. Trumper, ... 192
De Forest v. Jewett, ... 131
Delafield v. The State of Illinois, ... 221
De Mott v. Laraway, ... 292, 503, 519
Demandary v. Metcalf, ... 250
Demyer v. Souzer, ... 370
Depau v. The Ocean Ins. Co., ... 510
Denton v. Livingston, ... 209
Denew v. Daverill, ... 359
De Tollmere v. Fuller, ... 108, 114
Detouches v. Peck, ... 502
Dewell v. Maxon, ... 558
De Wolf v. Harris, ... 248
Dezell v. Odell, ... 63, 172
Dicas v. Stokely, ... 549
Dickerman v. Abrahams, ... 243
Dickerson v. Rogers, ... 392
Dickson v. Clifton, ... 467, 559
Dillenbeck v. Jerome, ... 60, 180
Dixon v. Baldwin, ... 536
Dodge v. Bartol, ... 510
Dorr v. N. J. Steam Nav. Co., 405, 468, 489, 515
Doorman v. Jenkins, ... 35, 107, 128, 277
Dobbin v. Thornton, ... 499
Doe v. Lansing, ... 392
Downs v. Ross, ... 347
Dominick v. Michael, ... 147
Donner v. Thompson, ... 563
Drake v. Mitchell, ... 187, 236
Drake v. Reddington, ... 326
Drinkwater v. Goodwin, ... 221
Dubois v. Del. & Hudson Canal Co., ... 365
Dudley v. Smith, ... 592
Dudley v. Bolles, ... 596
Duff v. Budd, ... 564
Duffie v. Hayes, ... 502
Dugeon v. Teass, ... 322
Duncan v. Spear, ... 278
Dunlop v. Hunting, ... 117, 228, 285, 288
Durell v. Mosher, ... 172, 175, 184
Durnford v. Patterson, ... 113
Dutton v. Solomonson, ... 562
Dwight v. Brewster, ... 425, 558
Dwight v. Whitney, ... 125
Dygert v. Bradley, ... 599

E.

Eagle v. White, ... 527
Earing v. Lansing, ... 595
Eaton v. Lynde, ... 354
East India Co., v. Pullen, ... 229, 432
Eaton v. Benton, ... 364
Edgar v. Bois, ... 290
Eddy v. Traver, ... 237
Edson v. Weston, ... 60, 61
Edwards v. Brewer, ... 538
Edwards v. Sherratt, ... 443
Elder v. Roase, ... 235, 265
Eldridge v. The Long Island R. R. Co., ... 593
Elliot v. Armstrong, ... 200, 262
Elliott v. Russell, ... 436
Ellis v. Hamlet, ... 362
Ellis v. Hamlin, ... 384
Ellis v. Hunt, ... 535
Elsee v. Gatward, ... 100, 111
Ely v. Ehle, ... 564
Enos v. Tuttle, ... 567
Evans v. Hutton, ... 524
Evans v. Polter, ... 280
Evans v. Potter, ... 125
Everett v. Coffin, ... 195
Everett v. Saltus, ... 562
Ewing v. French, ... 342
Ewing v. Thompson, ... 325

F.

Fairchild v. Slocum, ... 302
Falkner v. Brown, ... 56, 60, 64, 143, 152
Falkner v. Wright, ... 462, 527
Fanchot v. Leash, ... 183
Farnsworth v. Ganard, ... 358
Farnsworth v. Groat, ... 615
Farnsworth v. Packwood, ... 229, 421
Farwell v. Boston & W. R. Co., ... 602
Fell v. Knight, ... 409
Ferris v. Paris, ... 281
Feynson v. Lee, ... 209
Fielding v. Kymer, ... 118
Finacue v. Small, ... 72, 227, 284
Fish v. Chapman, ... 493
Fisher v. Bradford, ... 225
Fisher v. Cobb, ... 88
Fisher v. Prince, ... 132, 198, 260
Fisk v. Newton, ... 288
Fish v. Ross, ... 484
Fisk v. Newberry, ... 583

Fitzroy v. Gwillim, ... 244, 267
Fitzsimmons v. Milner, ... 308
Fletcher v. Heath, ... 215
Flewellin v. Rave, ... 154
Fonda v. Gross, ... 258
Foot v. Brown, ... 239
Foot v. Emmerson, ... 351
Foot v. Storrs, ... 227, 288
Forster v. Fuller, ... 58
Foster v. Frampton, ... 589
Foster v. Pettibone, ... 341
Foster v. The Essex Bank, ... 47, 66
Forward v. Pittard, ... 88, 168
Fox v. McGregor, ... 407
Fragano v. Long, ... 437
Francis v. Castleman, ... 374
Francis v. Wyatt, ... 420
Franklin's Case, ... 205
Frith v. Barker, ... 501
Fromont v. Coupland, ... 594
Fryatt v. The Sullivan Co., ... 78, 324
Fulton Bank v. New-York Canal Co., ... 577

G.

Gage v. Bulkley, ... 270
Gaither v. Barnet, ... 521
Gale v. Ward, ... 196
Galiaher v. Cohen, ... 356
Galloway v. Hughes, ... 521
Garbut v. Watson, ... 348
Gardner v. Adams, ... 200, 258
Gardner v. Campbell, ... 315
Garlick v. James, ... 198, 201, 225, 248
Garnett v. Willan, ... 478, 505
Garside v. Proprietors of T. and M. Nav., ... 286
Garside v. Trent and M. Nav. Co., ... 430
Garvey v. Fowler, ... 133, 555
Gates v. Green, ... 337
Gelley v. Clerk, ... 394
George v. Elliott, ... 336
Gibbon v. Paynton, ... 452, 465
Gibson v. Culver, ... 386, 509
Gibson v. Inglis, ... 300
Giles v. Grover, ... 92
Gillet v. Maynard, ... 370
Gillett v. Mawman, ... 358
Gilliat v. Lynch, ... 200
Gillingham v. Dempsey, ... 571
Girard v. Taggart, ... 283
Gisborn v. Hurst, ... 425, 430
Gleason v. Clark, ... 368
Gleason v. Henshaw, ... 125
Goff v. Clinkard, ... 442
Golden v. Manning, ... 515
Goodenow v. Tyler, ... 125, 221
Goodwin v. Holbrook, ... 181, 188
Goodyear v. Ogden, ... 59, 230, 239
Goold v. Chapin, ... 581
Gordon v. Buchanau, ... 169
Gordon v. Harper, ... 314
Gordon v. Hutchinson, ... 425
Gosling v. Burnie, ... 296, 306
Gosling v. Higgins, ... 524
Goss v. Withers, ... 464
Gough v. Bryan, ... 592
Gould v. Hill, ... 296, 468
Gracie v. Palmer, ... 550
Graham v. Dyster, ... 118, 213
Grant v. Button, ... 368
Grant v. Vaughan, ... 195
Graves v. Ticknor, ... 105, 176
Grey v. Oakley, ... 280
Green v. Clark, ... 563
Green v. Elmslie, ... 497
Green v. Greenbank, ... 146, 344
Green v. Hart, ... 191, 253
Greening v. Wilkinson, ... 198
Gregory v. Stryker, ... 352
Gregory v. Thomas, ... 271
Griffeth v. Wells, ... 390
Griffiths v. Lee, ... 479
Griggs v. Austin, ... 580
Grinnell v. Cook, ... 42, 163, 279
Grosvenor v. Phillips, ... 500, 563
Groves v. Buck, ... 348
Guerreiro v. Peile, ... 214

H.

Harrington v. Snyder, ... 149, 311
Hartford v. Jackson, ... 328
Harrison v. Harrison, ... 196
Harper v. Little, ... 121
Hays v. Riddle, ... 212, 227
Harris v. Bervoir, ... 157
Harrington v. Trustees of Rochester, ... 389
Halsey v. Brown, ... 427
Hallenbake v. Fish, ... 404
Haggerty v. Palmer, ... 217
Harris v. Rand, ... 459
Hare v. Fuller, ... 321
Hadley v. Clarke, ... 523
Han v. Cohoes Co., ... 276
Hall v. Griffin, ... 306
Handayside & al v. Wilson & al., ... 611
Hand v. The Elvira, ... 57
Hawkins v. Dutchess & O. S. Co., ... 611
Harlow v. Humiston, ... 614
Hartop v. Hoare, ... 92, 161
Hanford v. Artcher, ... 259
Hart v. Ten Eyck, ... 81, 222
Hallie v. Smith, ... 219, 500
Haywood v. Miller, ... 313
Harrison v. Murrell, ... 337
Hawkins v. Hoffman, ... 287, 538
Hartford v. Jones, ... 57
Hartfield v. Roper, ... 598
Hartwell v. Root, ... 569
Hall v. Southmayd, ... 133, 554
Hale v. Power, ... 579
Hastings v. Pepper, ... 331
Hall v. Tuttle, ... 196, 258
Hall v. Connecticut R. S. Co., ... 602
Hagne v. Porter, ... 563
Harris v. Packwood, ... 228, 478
Hartshorne v. Johnson, ... 547
Hastings v. Pepper, ... 503
Hadley v. Clark, ... 461
Hand v. Baynes, ... 460, 570
Hawley v. Smith, ... 405
Hall v. Robinson, ... 200
Hasbrook v. Vandevoort, ... 210, 218, 221, 240
Hammond v. Barclay, ... 195
Hatchwell v. Cook, ... 442
Hahn v. Corbett, ... 497
Herbert v. Hallett, ... 523
Herkimer M. & H. Co., v. Small, ... 233, 261
Herman v. Drinkwater, ... 804
Hendricks v. Robinson, ... 209
Hemphill v. Chenie, ... 301, 521
Hewson v. Deygert, ... 254
Hill v. Perrott, ... 213
Hill v. Gray, ... 160
Hill v. Owen, ... 402
Hills v. Bannister, ... 178
Hill v. Humphreys, ... 521
Higgins v. Emmons, ... 285
Higgins v. Scott, ... 270
Hinsdell v. Weed, ... 543
Hinde v. Whitehouse, ... 345
Hoar v. Parker, ... 193
Hollingsworth v. Broderick, ... 498
Hollister v. Nowlen, ... 433, 466
Hollister v. Bender, ... 176, 565
Hollingsworth v. Don, ... 386
Hoyt v. Geiston, ... 88, 155
Hollinshead v. Maetier, ... 385
Holbrook v. Baker, ... 248
Houtalling v. Marvin, ... 254
Holbrook v. Wright, ... 87, 114, 214, 291
Holbrook v. The Utica & S. R. Co., ... 589
Horton v. Holliday, ... 288
Hosmer v. Beebee, ... 283
Hopping v. Quin, ... 369
How v. Hall, ... 212
Hollzopfell v. Baker, ... 337
Homer v. Thwing, ... 146, 313
Homer v. Crane, ... 211, 227
Holmes v. Tremper, ... 386
Holmes v. Holmes, ... 243

Hoffman v. Carow, ... 93
Hooks v. Smith, ... 328
Hotchkiss v. M'Vickar, ... 62
Hotchkiss v. Le Roy, ... 369
Horner v. Wood. 133
Hodgson v. Loy, ... 535
Hodgson v. Fullerton, ... 442
Hodgson v. Malcom, ... 462
Hodge's Heirs v. Durnford, ... 114
Hyde v. Trent & M. Nav. Co., 33, 294, 430, 477, 507, 514
Hnnt v. Ennis, ... 126
Hutton v. Bragg, ... 550
Hunt v. Rousmaniere, ... 121, 126, 269
Hunt v. Fuller, ... 260
Hunt v. Dorman, ... 48
Hurd v. West, ... 137
Hunt v. Holton, ... 196
Hudson v. Guestier, ... 463
Huseley v. Branch, ... 322
Huntington v. Martin, ... 251, 268

I.

Ilsley v. Stubbs, ... 562
Ingalls v. Bills, ... 585
Ingersoll v. Von Bokkelin, ... 210, 270
Ingalls v. Lord, ... 129, 209
Isaac v. Clark, ... 87, 262
Isbel v. Norvell, ... 329
Ives v. Van Epps, ... 178
Izett v. Mountain, ... 470

J.

Jacoby v. Lanssatt, ... 291
Jackson v. Walker, ... 364
Jackson v. Baker, ... 232
Jackson v. Frier, ... 305
Jackson v. Davis, ... 305
Jackson v. Clark, ... 311
Jackson v. Roggers, ... 444
Jackson v. Covert, ... 348
Jackson v. Willard, ... 191, 253
Jackson v. King, ... 242
Jackson v. Van Dusen, ... 242
Jackson v. Sackett, ... 268
Jackson v. Myers, ... 266, 311
Jackson v. Henry, ... 264
Jackson v. Blodget, ... 191, 253
Jackson v. Vanderheyden, ... 49
Jackson v. Timmerman, ... 160
Jackson v. Tollett, ... 592
Jameson v. Drinkald, ... 611
James v. Bixby, ... 370
Jarvis v. Rogers, ... 193, 200, 210
Jacobs v. Lawton, ... 307
Jacobson v. La Grange, ... 364
Jennings v. Camp, ... 360
Jencks v. Coleman, ... 410, 577
Jewell v. Schroeppel, ... 361
Jennings v. Randall, ... 146, 313
Jewett v. Warren, ... 196, 265
Johnson v. Hudson, ... 390
Jones v. Pearle, ... 308
Jones v. Tyler, ... 398
Jones v. Thurloe, ... 413
Jones v. Osborn, ... 391
Jones v. Voorhees, ... 433, 484
Johnson v. The Schooner McDonough, ... 307
Johnson v. Friar, ... 492
Johnstone v. Osborne, ... 221
Johnston v. Benson, ... 496
Johnson v. Stone, ... 423
Jordan v. James, ... 308
Johnson v. Hill, ... 396, 582

K.

Kannen v. McMullen, ... 359
Kennedy v. Strong, ... 132, 213, 226
Kemp v. Westbrook, ... 192, 213, 250
Keutgen v. Parks, ... 234, 246, 267
Kettle v. Bromsale, ... 102, 135
Kemp v. Coughtry, ... 437, 505
Kent v. Shuchard, ... 398
Kennard v. Burton, ... 594
Kerr v. Monntain, ... 580
Kennedy v. Strong, ... 282, 572
Keegan v. Western R. R. Cor., ... 318
Kensig v. Eggleston, ... 512
Knapp v. Curtis, ... 88, 294
Knight v. Plymouth, ... 59
King v. Richards, ... 84, 583
King v. Baldwin, ... 237
Kilkman v. Shawcross, ... 308
King v. Humphrey, ... 307
King v. Brown, ... 351
King v. Lenox, ... 438
King v. Shepherd, ... 494
Kinlock v. Craig, ... 552
Kimball v. Huntington, ... 235
Koon v. Greenman, ... 366

L.

Laing v. Colden, ... 495
Lane v. Sir Robert Cotton, ... 412
Lantry v. Parks, ... 384
Lane v. Penniman, ... 547
Latham v. Rutley, ... 561
Lawrence v. Dale, ... 367
Lawson v. Weston, ... 195
Langdon v. Buel, ... 191, 252
Lanssatt v. Lippincot, ... 195, 213
Lansing v. Turner, ... 220
Lane v. Cotton, ... 102
La Place v. Aupoix, ... 332
Laugher v. Pointer, ... 315, 594
Lacost v. Pipkin, ... 315
Leckbarrow v. Mason, ... 210, 247
Leverich v. Meigs, ... 281
Le Roy v. Eastman, ... 230
Leach v. West, ... 329
Lewis v. Western Railroad Cor., ... 518
Leck v. Maester, ... 371
Leeson v. Holt, ... 476, 477
Leame v. Bray, ... 598
Lenox v. The U. S. Ins. Co., ... 510
Lee v. Atkinson, ... 314
Le Page v. McCrea, ... 232
Levi v. Waterhouse, ... 473
Litchfield v. White, ... 136, 228
Liddard v. Lopes, ... 502
Linkous v. Commonwealth, ... 410
Livingston v. Ackeston, ... 364
Lipsecombe v. Holmes, ... 367
Linningdale v. Livingston, ... 385
Lite et ux v. Perry, ... 185
Little v. Semple, ... 494
Linnendoll v. Doe and Terhune, ... 205
Livingston v. Harris, ... 244, 245
Livingston v. Bishop, ... 132, 187
Little v. Cowley, ... 535
Littler v. Holland, ... 383
Lodowsky v. McFarland, ... 105
Lobdell v. Hopkins, ... 182, 334
Lockwood v. Bull, ... 175, 226, 287
Lockwood v. Ewer, ... 193, 269
Lockwood v. Barnes, ... 351
Logan v. Matthews, ... 320
Lowry v. The Steamboat Portland, ... 609
Logan v. Ponchartrain R. Co, ... 576
Lovett v. Hobb, ... 432
Low v. Rice, ... 393
Lower v. Winters, ... 351
Lush v. Druse, ... 333
Lupton v. White, ... 81
Lnndsford v. Baynham, ... 323
Ludwig v. Meyer, ... 570
Luke v. Lynde, ... 501
Ludden v. Leavett, ... 142
Lubbock v. Inglis, ... 305
Lyon v. Mells, ... 467
Lyon v. Smith, ... 443
Lyel v. Barker, ... 270

M.

Mayor, &c., v. Furze, ... 56
Mason v. Denison, ... 50

Markham v. Brown,..... 410, 577
Mason v. Thompson,..... 393
Marsh v. Rulesson,..... 361
Mayor, &c., v. Bailey,..... 317
Mallory v. White,..... 341
Mahew v. Boyce,..... 372
Mayhew v. Nelson,..... 566
Mayhew v. Eames,..... 569
Mallory v. Willis,..... 342
Manhattan Co v Bentley,..... 134
Mayor v. Humphries,..... 592
Maving v. Todd,..... 296
Mayor of Columbus v. Howard,..... 327
Macomber v. Parker,..... 196, 211
May v. Babcock,..... 512
May v. Harvey,..... 85
Mactier v. Frith,..... 123
Mason v. Briggs,..... 117, 182
Max v. Roberts,..... 556
Machn v. The London and S. Railway Co., 507
Marshall v. Bryant,..... 257
Martini v. Coles,..... 214
Marsh v. Blythe,..... 498
Mallough v. Barbour,..... 122
Marsh v. Horne,..... 228, 472
Martin v. Mowlin,..... 191, 258
Marsh v. Lawrence,..... 204, 209
Mayor v. Pine,..... 351
McCartee v. Chambers,..... 369
McManus v. Crickett,..... 319
McFarland v. Crary,..... 369
McMillan v. Vanderlip,..... 360
McLaughlin v. Waite,..... 55, 65
McGill v. Rowland,..... 581
McKinney v. Neal,..... 592
McFarland v. Wheeler,..... 195, 549, 355
McDonald v. Hewett,..... 310
McCall v. Forsyth,..... 557
McClure v. Hammond,..... 437
McFarland v. Wheeler,..... 195, 355
McLean v. Walker,..... 189, 198, 200, 225, 249
McCracken v. Luce,..... 209
McComble v. Davies,..... 193, 211, 214
McArthur v. Wilder,..... 287
McHenry v. Railroad Co.,..... 457, 572
McArthur v. Sears,..... 168, 456
McAllister v. Hammond,..... 598
McDonald v. Edgerton,..... 397
M. Gregor v. Kilgore,..... 570
McDonald v. Hodge,..... 290
McKenzie v. Scott,..... 281
McMahon v. Sloan,..... 172
McCulloch v. Eagle Ins. Co.,..... 123
McAllister v. Reab,..... 178
McCarty v. Vick,..... 247
McCarty v. Vickery,..... 130
Meech v. Smith,..... 282
Meny v. Greene,..... 134
Meany v. Head,..... 308, 551
Merwin v. Butler,..... 434, 526
Menetone v. Athawes,..... 857
Merritt v. Johnson,..... 76, 340
Merian v. French,..... 543
Mersereau v. Norton,..... 208
Messiter v. Cooper,..... 577
Merritt v. Foster,..... 127
Merchants' Bank v. N. J. Steam Nav. Co., 468
Melville v. Brown,..... 208
Medbury v. Watrous,..... 146
Metcalf v. Sholey,..... 204
Mills v. Stewart,..... 87
Middleton v. Fowle,..... 551, 577
Miller v. The Steam Nav. Co.,..... 530
Mitchell v. Williams,..... 172
Miller v Race,..... 195
Million v. Salisbury,..... 88, 311, 323
Middleton v. Fowles,..... 432
Mitchell v. Ede,..... 280, 500
Micklethwaite v. Thebaud,..... 284
Mires v. Solebay,..... 291, 318
Milliyan v. Wedge,..... 317
Miller v. Drake,..... 58
Miller v. Adsit,..... 61, 68
Miles v. Cattle,..... 452, 470
Mitchell v. Ostram,..... 565
Mixer v. Howarth,..... 348
Moffatt v. East India Co.,..... 547
Morse v. Crawford,..... 321
Mount v. Derrick,..... 318
Mowry v. Walsh,..... 162
Moseley and Fossett,..... 278
Mohawk and H. R. R. v. Clute,..... 85
Mores v. Conham,..... 191, 210, 238
Motram v. Heyer,..... 537
Morgan v. Congdon,..... 279, 355
Moore v. Fox,..... 369
Morgon v. Livingston,..... 74
Mors v. Slue,..... 454
Moreton v. Harden,..... 319
Morrill v. The Great Northern R. Co.,..... 573
Moneypeny v. Hartland,..... 359
Moller v. Living,..... 499
Moore v. Fox,..... 351
Moore v. Hitchcock,..... 205, 353
Morse v. Woods,..... 265
Mowry v. Walsh,..... 93, 247
Mucklow v. Mangles,..... 345
Mumford v. Stocker,..... 271
Muschamp v. Lancaster Railway,..... 302, 505
Mulloy v. Backer,..... 547
Murray v. Burling,..... 56, 129
Murray v. Burtis,..... 258
Munn v. Baker,..... 569
Mull v. Kelley,..... 55
Mytton v. Cock,..... 68, 278

N.

Nash v. Mosher,..... 196, 211
Nash v. Ely,..... 220, 258
Naylor v. Mangles,..... 309
Nelson v. Macintosh,..... 104
New Jersey Steam Nav. Co. v. Merchant's Bank, &c.,..... 488, 554
Newhall v. Vargas,..... 538
Nellis v. Clark,..... 264
Neptune the Second,..... 618
Newton v. Pope,..... 323
Nicholson v. Monnsey,..... 618
Nicholson v. Chapman,..... 90, 168
Nichols v. Roland,..... 107
Nicholson v. Willan,..... 470
Nocholet's adm. v. Pillot,..... 122
Norton v. Squire,..... 256
Noble & Palmer v. Paddock,..... 604
Nourse v. Prime,..... 204, 222, 230
Norton v. The People,..... 142
Norton v. Woodruff,..... 310, 335

O.

Oakley v. Greenshaw,..... 282
O'Conner v. Foster,..... 571
Olmstead v. Hotalling,..... 50
Ogle v. Atkinson,..... 295
Oppenheim v. Russell,..... 536
Orser v. Storms,..... 143, 156, 176, 184
Orange County Bank v. Brown,..... 408
Osterhout v. Roberts,..... 132, 187, 272
Osbord v. Groning,..... 545
Ostrander v. Brown,..... 286, 503
Otis v. Wood,..... 209
Overseers, &c., of Crown Point v. Warner, 388

P.

Pattison v. Wallace,..... 374
Palmer v. Grand Junction R. Co.,..... 587
Parker v. James,..... 330
Pattison v. Hull,..... 192, 233
Paine v. Cave,..... 125
Patterson v. Tash,..... 118, 214
Parkhouse v. Foster,..... 391
Patten v. Magrath,..... 436, 560
Park v. Hammond,..... 122
Panton v. Panton,..... 82
Pardee v. Drew,..... 433
Packard v. Getman,..... 130, 508
Patchin v. Pierce,..... 198, 249, 253
Parker v. Branker,..... 198

Palmer v. Lorillard,..... 460
Patten v. Thompson,..... 500
Paige v. Lenox,..... 463
Patterson v. Patterson,..... 364
Paragon, The,..... 503
Parker v. Flagg,..... 513
Parmelee v. Thompson,..... 393
Parsons v. Hardy,..... 519
Parson v. Hardy,..... 458
Parsons v. Monteath,..... 469, 528
Peet v. M'Graw,..... 395
Pepper v. Burland,..... 385
Percival v. Hickey,..... 599
Pepper v. Burland,..... 362
People v. Morris,..... 389
Perkins v. Pickett,..... 443
Perry v. Craig,..... 232
Penny v. Porter,..... 560
Peck v. Neil,..... 592
People v. McGarren,..... 161
People v. Holhrook,..... 212
People v. Hulse,..... 604
People v. Moores,..... 147
Peacock v. Rhodes,..... 195
Percy v. Melandor,..... 113
People v. McLeod,..... 569
People v. Anderson,..... 161
Peixotti v. M'Laughlin,..... 433
Phillips v. Earle,..... 450
Phillips v. Butler,..... 383
Phillips v. Hall,..... 62
Philbrook v. Belknap,..... 351
Phillips v. Cook,..... 208
Philadelphia and Railroad Co. v. Derby,.. 507
Pierce v. Schenck,..... 186, 231, 340
Pickard v. Sears,..... 63
Pierre v. Roberts,..... 233
Pickering v. Bush,..... 217
Pierce v. Kearney,..... 225
Piper v. Many,..... 404
Pickford v. The Grand Junc'n R. Co., 450, 553
Pickett v. Downer,..... 523
Pinney v. Gleason,..... 290
Pickering v Barkley,..... 491
Powley v. Walker,..... 378
Pomeroy v. Smith,..... 204, 270
Pozzi v. Shifton,..... 560
Powell v. Myers,..... 527
Powell v. Brown,..... 58
Poole v. Symonds,..... 142
Powers v. Mitchell,..... 231, 289
Powers v. Davenport,..... 431
Powell v. Waters,..... 285
Pothonier v. Dawson,..... 256
Potter v. Lansing,..... 562
Plaisted v. Boston and K. Steam Nav. Co., 493
Platt v. Hibbard,..... 226, 288, 506
Pluckwell v. Wilson,..... 597
Prescott v. Hull,..... 189
Price v. Powell,..... 437
Pringle v. Phillip,..... 217
Prosser v. Woodward,..... 217
Proctor v. Nicholson,..... 418
Prentice v. Slack,..... 259
Price v. Ralston,..... 282
Price v. Powell,..... 226, 543
Preston v. Preston,..... 271
Putnam v. Wyley,..... 76, 143, 240
Putnam v. Wise,..... 116

Q.

Quarman v. Burnett,..... 316
Quiggin v. Duff,..... 298
Quinton v. Courtney,..... 400

R.

Railroad Co. v. Kidd,..... 321
Ramsdell v. Morgan,..... 246, 267
Randall v. Cook,..... 258
Rathbun v. Payne,..... 599
Rayner v. Clark,..... 133
Raymond v. Bearnard,..... 385
Randleson v. Murray,..... 292
Rapson v. Cubitt,..... 317
Randle v. Harris,..... 58
Raymond v. Wheeler,..... 565
Raymond v. Lent,..... 167
Ratcliffe v. Davis,..... 210, 260
Rathbun v. Ingalls,..... 228
Raphael v. Pickford,..... 525
Ratcliff v. Vance,..... 192, 240
Rawson v. Johnson,..... 553
Reid v. Rensselaer G. Factory,..... 242
Renner v. The Bank of Columhia,..... 427
Rodgers v. Rodgers,..... 133
Redding v. Hall,..... 337
Renselaer Glass Factory v. Reid,..... 182, 262
Reynolds v. Tappan,..... 439
Rex v. Ivers,..... 579
Reeves v. Cappen,..... 198
Reynolds v. Shuler,..... 205, 332
Reeves v. Smith,..... 266
Rew v. Barber,..... 192
Reah v. McAllister,..... 178
Rex v. Harvey,..... 161
Riley v. Horne,..... 41, 424
Richmond v. Smith,..... 398
Richmond T. Co. v. Vanderbelt,..... 319
Richards v. Salter,..... 85
Rich v. Kneeland,..... 441
Richards v. Gilbert,..... 461
Richardson v. Atkinson,..... 554
Riley v. Suydam,..... 147
Rightmyer v. Raymond,..... 341
Rich v. Aldred,..... 185
Roof v. Stafford,..... 51, 243
Robinson v. Batchelder,..... 334
Rotch v. Hawes,..... 313
Ross v. Norvell,..... 240
Robson v. Godfrey,..... 362
Roberts v. Turner,..... 293, 466
Rondeau v. Wyatt,..... 348
Ross v. Johnson,..... 287, 554
Root v. French,..... 93, 160, 247
Robertson v. Kennedy,..... 456
Rowley v. Horne,..... 479
Rowley v. Bigelow,..... 266
Roskell v. Waterhouse,..... 447
Root v. Chandler,..... 64, 144, 155
Roberts v. Turner,..... 506
Robinson v. Marine Ins. Co.,..... 501, 545
Rowe v. Pickford,..... 536
Robinson & Co. v. Kennedy,..... 429
Rooth v. Wilson,..... 102, 142, 270, 278
Roberts v. Hyatt,..... 211, 227
Robinson v. Walter,..... 583
Robinson v. Dunmore,..... 429, 563
Ross v. The People,..... 161
Rogers v. Arnold,..... 217
Rogers v. Morton,..... 195, 234
Russell v. La Roque,..... 247, 265
Russell v. Hester,..... 238
Rushforth v. Hadfield,..... 278, 308, 509
Russell v. Slade,..... 351
Russell v. Clapp,..... 554
Russell v. Hankey,..... 221
Rnssell v. Nicol,..... 348
Russell v. Palmer,..... 376
Rutgers v. Lucet,..... 48
Rutgers v. Sweet,..... 36
Rutherford v. M'Gowen,..... 441
Runyan v. Nichols,..... 368
Rundell v. Moore,..... 280
Runyan v. Caldwell,..... 320

S.

Sager v. The Portsmouth S. & P. & E. R. Co.,..... 575
Satterlee v. Groat,..... 425
Sanders v. Spencer,..... 401
Salt v. Field,..... 127
Sackett v. Andross,..... 128
Salishury v. McCoon,..... 78
Saul v. Kimger,..... 211 255
Sammell v. Wright,..... 315
Sage v. Gittner,..... 285

Sanger v. Eastwood, ... 220, 258
Sargent v. Gile,. 88, 114, 328
Saltus v. Everett, ... 247
Sawyer v. Joslin, ... 539
Scott v. Sholey, ... 204
Schieffelin v. Harvey, ... 436
Schenck v. Strong, ... 335
Schmidt v. Blood, ... 223, 284, 288
Scott v. Surman, ... 221
Schooner Reeside, ... 512
Scott v. Libby, ... 542
Scott v. Crane, ... 117, 333
Scranton v. Baxter, ... 138, 145, 149, 158
Serjeant v. Blunt, ... 150
Seymour v. Brown, ... 186, 310
Seggart v. Scott, ... 499
Sewall v. Allen, ... 426
Selway v. Holloway, ... 446
Seare v. Prentice, ... 376
Sewall v. Fitch, ... 347
Sears v. McArthur, ... 440
Sheppard v. De Barnales, ... 564
Sheeter v. Hurlock, ... 283
Sheldon v. Soper, ... 205, 254
Shelbury v. Scotsford, ... 540
Shephard v Johnson, ... 260
Shield v. Davis, ... 460, 501, 561
Shaw v. York & N. Midland R. Co., ... 572
Shepard v. M'Evers, ... 116
Shillabeer v. Glyn, ... 111, 120
Sharp v. Grey, ... 434
Shakleford v. Wilcox, ... 451
Sheldon v. Robinson, ... 426, 521
Sherman v. The Mayor, &c. of New-York, 364
Sheldon v. Skinner, ... 333
Sinclair v. Pearson, ... 327
Sizer v. Heacock, ... 235
Simpson v. Hand, ... 606
Sidaways v. Todd, ... 299
Singleton v. Hilliard, ... 495
Siordett v. Hall, ... 458
Sinclair v. Bowles, ... 385
Sickles v. Pattison, ... 359
Sill v. Hood, ... 368
Sims v. Chaplin 450
Skelding v. Whitney, ... 376
Sleat v. Fagg, ... 476, 561
Slingerland v. Morse, ... 117, 285
Slaymaker v. Wilson, ... 269
Sly v. Edgeley, ... 317
Slater v. Baker, ... 376
Smith v. Smith, ... 290
Smith v. Surman, ... 349
Smith v. Loomis, ... 334
Smith v. Lascelles, ... 377
Smith v. Shepherd, ... 455
Smith v. Wright, ... 460, 501
Smith v. Scott, ... 498
Smith v. Horne, ... 478
Smith v. Griffeths, ... 571
Smith v. Clark, ... 186, 231
Smith v. Van Loan, ... 234
Smith v. James, ... 61, 64, 270
Smith v. Benson, ... 78
Smith v. Acker, ... 220, 258
Smith v. Oliphant, ... 147
Smith v. Goss, ... 536
Smith v. Leavensworth, ... 182
Smith v. Seward, ... 557
Smedes v. Utica Bank, ... 112
Sneider v. Geiss, ... 399
Snyder v. Sponable, ... 147
Snell, Stagg & Co. v. Rich, ... 604
Sodowsky v. McFarland, ... 86
Solomons v. Dawes, ... 291
Spain v. Arnott, ... 384
Spencer v. Blackman, ... 278
Spencer v. Pilcher, ... 322
Steamboat Co. v. Bason, ... 462
Stevens v. Wilson, ... 215
Stevens v. Low, ... 290
Stevens v. Adams, ... 367
Stone v. Knowlton, ... 560
Stuart v. Crowley, ... 450, 504
Stearns v. Marsh, ... 198, 201, 213, 232, 248
Stony v. Wooster, ... 247, 265
Striker v. Mott. 393
Stonard v. Dunkin, ... 306
Stule v. Wright, ... 338
Stephens v. Beard, ... 384
Stephenson v. Hart, ... 332
Steamboat Co. v. Whilldin, ... 607
Stalker v. McDonald, ... 234
Sterling v. The M. and S. Trading Co., ... 235
Sterling v. Rogers, ... 271
Standsford v. Amoss, ... 325
Stevens v. Bell, ... 248, 260
Stevens v. Robbins, ... 281
Steinman v. Wilkins, ... 307
Strong v. Wooster, ... 234, 237
Stevens v. Fisher 258
Stewart v. Lispenard, ... 52
Stevens v. Elwall, ... 332
Stewart v. Frazier, ... 78
Strong v. New-York Fireman's Ins. Co., .. 509
Stokes v. Saltonstall, ... 573
Stoddard v. Long Island Railroad Co. 531
Stanton v. Bell, ... 86, 105
Steif v. Hart, ... 87, 206
Storm v. Livingston, ... 130, 318
Stevens v. Wilson, ... 118
Stephenson v. Hart, ... 564
St. John v. Van Santvoord, ... 302, 504
Sutton v. Buck, ... 64, 134, 142
Supervisors v. Dorr, ... 59
Swigett v. Graham, ... 321, 573
Switzer v. Valentine, ... 243
Suydam v. Jenkins, ... 132
Swift v. Lyson, ... 119
Sunbolf v. Alford, ... 413, 582
Sweet v. Pym, ... 413, 549
Swift v. Moseley, ... 321
Syms v. King, ... 329
Syms v. Chaplin, ... 570
Sydam v. Smith, ... 117, 289
Syed v. Hay 129, 332

T.

Taylor v. Plumber, ... 283
Taylor v. Linday, ... 151, 157
Taylor v. Monnot, ... 422
Taylor v. Bates 228
Taylor v. Plummer, ... 540
Taggard v. Curtenius, ... 232
Tennoyer v. Hallet, ... 502
Templane v. Case, ... 88
The Marianna Flora, ... 171
Thompson v. Lacy, ... 391
Thompson v. Leach, ... 242
Thompson v. Hewitt, ... 225
Thompson v. Perkins, ... 214
Thomas v. Boston Prov. R. R. Co., 294, 443, 516
Thurman v. Wells 200
Tharpe v. Stallwood, ... 184
The Maria, ... 613
The Kendsberg 103
Thorpe v. White, ... 360
Thorp v. Burling, ... 88, 143
The Neptune, ... 612
The Duke of Sussex, ... 607
The Paragon, ... 331
The Itinerant, ... 606
Thomas v. Day, ... 292
The William, ... 140
The Friends, ... 610
Tobin v. Crawford, ... 542
Towson v. The Havre de Grace Bank, ... 395
Thorne v. Deas, ... 35, 99
Tower v. Utica and S. R. R. Co., ... 432
Towers v. Osborne, ... 348
The Shannon, ... 611
Titchburne v. White, ... 465
Tompkins v. Saltmarsh, ... 140, 328, 567
Tooke v. Hollingworth, ... 219
Tracy v. Wood, ... 74, 102, 140
Trash v. Duval, ... 543
Trent and Mersey Nav. Co. v. Wood, ... 425

Turney v. Wilson, ... 492
Turley v. Thomas, ... 596
Tucker v. Wilson, ... 198
Turrill v. Crawley, ... 583
Tuttle v. Mayo, ... 131, 287
Tucker v. Cracklin, ... 566
Twetell v. Barenden, ... 267
Tyly v. Morrice, ... 470

U.

Udal v. Kenney, ... 127
Ulmer v. Ulmer, ... 114, 284
Union Bank v. Laird, ... 265
Upshare v. Aidee, ... 434
Urquart v. McIver, ... 195, 213, 216, 282
U. States v. Hooe, ... 248
U. States v. Palmer, ... 171

V.

Vale v. Dale, ... 564
Van Santvoord v. St. John, ... 286, 507
Van Natta v. Mutual Security Ins. Co., ... 356
Vallejo v. Wheeler, ... 550
Van Allen v. Vanderpool, ... 221
Van Antwerp v. Newman, ... 210
Van Amringe v. Peabody, ... 214
Van Cleef v. Fleet, ... 267
Van Epps v. Harrison, ... 178
Vance v. Phillips, ... 259
Van Rensselaer. v Jewett, ... 241
Vassar v. Camp, ... 123, 124
Vasse v. Smith, ... 145, 313
Vaughan v. Menlove, ... 164, 278
Veil v. Mitchell, ... 283
Vertue v. Jewell, ... 500

W.

Wallace v. Morss, ... 50, 146
Wallace v. Vigus, ... 459, 525
Wash v. Whitcomb, ... 269
Ward v. Felton, ... 543
Walter v. Brewer, ... 438
Wallis v. Manhattan Bank, ... 126
Ward v. Macauley, ... 314
Watson v. Brinth, ... 99
Ware v. Gay, ... 587
Waland v. Elkins, ... 593
Wayde v. Lady Carr, ... 596
Waring v. Clark, ... 605
Waring v. Morse, ... 494
Walker v. Maitland, ... 497
Waring v. Coxe, ... 499
Walpole v. Bridges, ... 493
Walpole v. Ewer, ... 510
Watson v. Duykinck, ... 502, 580
Wardell v. Mourillyan, ... 506
Walcott v. Canfield, ... 560
Watkinson v. Laughton, ... 571
Warden v. Greer, ... 571
Walkinson v. Lawton, ... 436
Watts v. Friend, ... 350
Waters v. Taylor, ... 126
Watt v. Potter, ... 291
Waterman v. Robinson, ... 92, 142
Warner v. Beardsley, ... 194
Waddell v. Cook, ... 208
Walbroke v. Griffeth, ... 394
Warren v. Leland, ... 142
Wardell v. Howell, ... 148
Ward v. Green, ... 440
West v. Wentworth, ... 198, 287
Wedderburn v. Bell, ... 617
Weed v. The Sar. and S. R. Co., ... 302, 443, 505
Weaver v. Ward, ... 599
West v. Beach, ... 182, 572
Welch v. Hicks, ... 501, 545
Wells v. The Steam Nav. Co., ... 296, 574
Webb, Matter of, ... 293
Welland C. Co. v. Hathaway, ... 63
Wentworth v. Day, ... 90
Whitmarsh v. Hall, ... 147
Whitehead v. Anderson, ... 538
Whitaker v. Sumner, ... 210
Wheeler v. Russell, ... 390
Whitesides v. Thurlkill, ... 493
Whittier v. Smith, ... 87, 539
Whitesides v. Russell, ... 493
Whalley v. Wray, ... 452, 504
White v. Humphrey, ... 292, 449
Whitaker v. Sumner, ... 270
White v. Cole, ... 259
White v. Webb, ... 88
Whitten v. Fuller, ... 132
Wharton v. Thompson, ... 322
White v. Platt, ... 226
Whitlock v. Heard, ... 261
Wheatley v. Low, ... 106, 120
White v. Gifford, ... 127
Whitlock v. Stewart, ... 266
Wheelock v. Wheelright, ... 138, 321
Wheaton v. Hibbard, ... 247
Wheelright v. Depeyster, ... 93
Wheeler v. McFarland, ... 205
Wintermute v. Clark, ... 407
Wilson v. Freeman, ... 475
Wilkes v. Ferris, ... 204, 220
Wilcox and Fern v. Steamboat Phila., ... 458
Wilson v. Anderton, ... 539
Willoughby v. Backhouse, ... 333
Wibert v. The N. Y. and Erie R. Co., ... 520
Wilcox v. Parmelee, ... 302, 504
Wilson v. Anderton, ... 186
Wilson v. Little, ... 197, 203, 213, 251
Wilson v. Brett, ... 166, 187
Wilsford v. Wood, ... 561
Wilkinson v. Coverdale, ... 120
Wilkinson v. King, ... 87
Witherell v. Gartham, ... 59, 230
Willard v. Stone, ... 243
Wilson v. Burr, ... 49
Willard v. Bridge, ... 237
Wilmouth v. Patten, ... 182
Wilson v. Dickson, ... 570
Willoughby v. Comstock, ... 232, 254
Williams v. Smith, ... 236, 546
Williams v. Hitchcock, ... 573
Williams v. Grant, ... 458
Williams v. Bronson, ... 498
William v. Little, ... 250
Williams v. East India Co., ... 128
Williams v. Sherman, ... 262
Williams v. Peytavin, ... 448
Williams v. Amory, ... 208
Wood v. Lowry, ... 220, 258
Wood v. Ash, ... 76, 240
Wordsworth v. Willan, ... 595
Woods v. Russell, ... 344
Woodward v. Washburn, ... 318
Woodrop Sims, ... 611
Woodcock v. Bennett, ... 183
Wolf v. Summers, ... 550
Wolfe v. Myers, ... 490
Wright v. Snell, ... 476
Wright v. Wilcox, ... 319
Wyld v. Pickford, ... 488, 574
Wynn v. Allard, ... 592

Y.

Yate v. Willan, ... 470
Youl v. Harbottle, ... 332
Young v. Covell, ... 160
Young v. Bruces, ... 335
Young v. Smith, ... 526
Yorke v. Grenaugh, ... 280, 412

TREATISE

ON THE

LAW OF BAILMENTS.

CHAPTER I.

ON BAILMENTS.

THE delivery of goods in trust for a specific purpose, termed a bailment, is a species of contract frequently in the course of business implied by law. The contract results from the delivery of the goods for a particular use or purpose. According to Mr. Justice Blackstone, "Bailment, from the French *bailler*, to deliver, is a delivery of goods in trust upon a contract, express or implied, that the trust shall be faithfully executed on the part of the bailee."[1] The degree of fidelity or care required of the bailee, that is, of the person to whom the goods are committed in trust, varies with the circumstances of the case. Sir William Jones, an author of high authority, defines bailment as "a delivery of goods in trust on a contract, expressed or implied, that the trust shall be duly executed, and the goods redelivered as soon as the time or use for which they were bailed shall have elapsed or be performed."[2] This definition, accurate so far as most kinds

[1] 2 Black. Comm., 452.

[2] Jones on Bailm., 117.

of bailment are concerned, has been criticised as defective, because it does not include chattels delivered for sale, or under such circumstances that a return of them is not contemplated. Indeed, it is not easy to express in a single sentence all those conditions, and those only which accompany every case of bailment. Mr. Justice Story defines bailment as "a delivery of a thing in trust for some special object or purpose, and upon a contract, express or implied, to conform to the object or purpose of the trust."[1]

It has been doubted whether the term bailment is strictly applicable to the case of goods delivered to a factor for sale;[2] and in the case of a bailee without hire, the contract, if such it may be called, limits the liability of the bailee to answer in damages only for gross neglect.[3] The general rule seems to be, that the delivery of goods for use, keeping, or on some other trust, where the right of property in them does not pass, creates a bailment; the bailee, it is true, acquires a special property in them, sufficient to enable him to defend them against a stranger, but the right to a *chose* in action remains in the bailor. Being answerable for the property, the law gives to the bailee a right of action agaist third persons who shall take or injure the same.[4] He is in a certain sense the agent of the bailor, charged with the execution of a trust connected with the custody of the property delivered to him; and in this capacity he is clothed with the rights necessary to the fulfillment of his duties under the trust.

In order to secure the faithful discharge of these duties, the law implies a contract on the part of the bailee to discharge them with fidelity, and measures the diligence demanded of him by the nature of the bailment. If he receives no reward, he is bound only for the good faith with which he performs his undertaking; but if he has his hire, his diligence must be increased beyond that which is required of the mere depositary. This principle we shall find running through the whole subject of the law of bailments, propor-

[1] Story on Bailm., § 2.
[2] 2 Kent Comm., Lect. 40. But see 2 Ld Raym., 917, 918.
[3] 11 Wend., 25, Beardsley v. Richardson.
[4] 2 Black. Comm., 453.

tioning the duty of the bailee with the consideration he receives.

Authors of received authority on the subject generally specify five sorts or classes of bailment, which are defined as follows:

1. *Depositum*, that is, a simple delivery or deposit of goods, to be kept and returned without recompense. The depositary is here under but a limited liability, being answerable only for gross neglect. As he receives no reward for the service, the law does not render him responsible for anything more than the ordinary care which he bestows upon his own property of a similar nature. The fact, however, that his own goods are lost under the same circumstances, is not conclusive evidence of reasonable diligence in the bailee;[1] though it is without doubt an important if not a controlling circumstance to be considered in determining his liability. If he spontaneously propose and assume to keep the goods, his responsibility is increased so far that he is liable for ordinary neglect.[2] The question of negligence is usually addressed to the discretion of a jury, with whom, under the charge of the court, it rests to find what is the kind or degree of neglect disclosed in the case. Though he receives no compensation, he must keep the property intrusted to him with reasonable care.

2. *Mandatum*, or commission, is a species of bailment where the bailee receives goods, and without reward undertakes to do some act about them, or simply to carry them. This kind of undertaking does not differ materially from that of the bailee in the case of deposit; the duties and liabilities arising out of it are very similar. The actual entrance upon the work to be performed is the ground of liability, since an executory contract of this nature cannot be enforced, wanting, as it does, the essential ingredient of a consideration promised or received. This doctrine is clearly established in the case of Thorne vs. Deas,[3] where it is shown that a

[1] Doorman v. Jenkins, 4 Neville & Manning, 170.

[2] Jones on Bailm., 48.

[3] 4 John. Rep., 84.

promise to become a mandatory without compensation cannot be enforced. There must be a present promise, accompanied by some act of performance, in order to create a binding contract; and the bailee is then responsible only when guilty of gross negligence.[1] It was formerly held that special damages arising from the failure to perform an undertaking of this kind would be sufficient to support the action. The mere agreement to undertake the trust *in futuro* does not bind; but when once undertaken, and the trust is actually *entered upon*, the bailee is bound to perform it according to the terms of his agreement. The confidence placed in him, and his undertaking to execute the trust, raise a sufficient consideration. In truth, the execution of the mandate commences with the bailment or delivery of the goods. By receiving them into his custody for a particular purpose, the bailee assumes the responsibility of executing the trust.

3. *Commodatum* is the loan or bailment of goods to be used for a certain time and then returned to the owner, and is made for the accommodation of the bailee; as the loan of a horse or carriage, from which the owner derives no benefit. In this contract the bailee is required to exercise the greatest care, and is responsible for even slight neglect.[2] If the property be borrowed for one purpose and used for another, the borrower is liable in all events,[3] and may be compelled to pay for the use; the breach of the agreement restores to the owner the right of compensation as for hire. When the borrower and lender both participate in the advantage derived from the use of the thing loaned, the bailee is liable for only ordinary neglect; for this is in reality not a loan, but a bailment for hire.

In this species of bailment, where the borrower acquires the use of property gratuitously, the highest degree of diligence is required, and the most exact and scrupulous observance of the conditions of the loan. One who receives a

[1] Stanton v. Bell, 2 Hawks, 145; Sodowsky v. McFarland, 3 Dana, 215; Rutgers v. Sweet, 2 John. Cases, 95.

[2] Jones on Bailm., 75.

[3] 1 Cowen's Trea., 3d ed., 70.

benefit is legally, as well as honorably, bound to take diligent care that it shall not prove a detriment to the person who confers it.

4. Property delivered in pledge for debt, *pignori acceptum*, is a bailment in the nature of collateral security. The title remains in the pledgor, so that under our statutes it may be levied upon and sold as his property, but after the sale, the pledgee is entitled to the possession of it until the purchaser redeems it from him. At common law, however, goods pawned or pledged are not liable to be taken in execution in an action against the bailor;[1] and the special property of the pawnee gives him a right of action against the officer who assumes to take them,[2] and even against the owner himself who wrongfully attempts to repossess them.[3] For the purposes of the pledge he acquires a paramount right over the property, and is responsible for ordinary neglect. If he convert the property to his own use, or dispose of it in any manner contrary to the trust, he is liable to the owner for its value.[4]

Goods are delivered in pledge for the mutual benefit of the parties to the contract; and hence the responsibility of the pledgee is the same as that of the bailee for hire. He has an advantage from the security it furnishes him for the payment of his demand, and the owner of the things pledged gains a credit; so that in the eye of the law the parties stand upon an equal footing.

5. A hiring,[5] termed in the civil law *locatio conductio*, is a bailment of goods always for a reward, and includes the hire of things for use, *locatio rei;* the hire of deposit or storage, *locatio custodiæ;* hire of labor and services to be performed on the goods delivered, *locatio operis faciendi;* and hire of carriage, *locatio operis mercium vehendarum*. Hire for use, such as hiring horses and carriage for a journey, is a bailment of property which renders the bailee responsible for ordinary

[1] Steif v. Hart, 1 Comst. R., 20, and cases cited by J. Jewett.

[2] 5 Binney, 457.

[3] Mills v. Stewart, 5 Humph. R., 308.

[4] Jones on Bailm., 121.

[5] Jones on Bailm., 86; and Story on Bailm., § 8.

neglect.[1] The hire of deposit, such as the storage of goods by commission merchants and warehousemen,[2] concerns the custody, and requires ordinary diligence in the bailee. Innkeepers, from motives of public policy, are held to a much higher responsibility. Where work is to be done on the property, as where cloth is left with a tailor to be made into clothes, or logs at a saw mill to be converted into boards, it is termed a bailment for labor and services, and the bailee is liable for ordinary neglect. In such cases there is an implied contract that the work shall be done in a workmanlike manner. The hire of carriage, or transportation of goods by a common carrier, is such a bailment of goods as renders the bailee liable for them without any neglect, unless the loss be caused by inevitable accident, by public enemies, or by the act of the owner of the property. The policy of the law holds him to a strict accountability, and makes him in effect an insurer of the goods.[3]

The various degrees of liability imposed on the bailee are graduated by the circumstances attending the trust. He that borrows his friend's horses or books, clearly is in honor bound to take vigilant care of them, so that the lender may not suffer by his kindness; and the principle that holds the borrower responsible for even a slight neglect of this duty is confessedly just. Every one readily recognizes it as a natural obligation. So, where the owner of property deposits it with his neighbor, who receives it into his house or store without pay, and solely as an accommodation, it is plain that, if he take the same care of it as he does of his own goods, nothing more can in fairness be demanded of him. Unless he be guilty of gross neglect, which is morally as well as legally a breach of good faith, he ought not to be responsible for loss. The rule of equity is the rule of law in such a case. Every man is bound under all circumstances to deal honestly, and that is the limit of his responsibility as a mere

[1] Millon v. Salisbury, 18 J. R., 211.

[2] Knapp v. Curtis, 9 Wend., 60.

[3] 12 Mod., 482; Jones on Bailm., 108; Forward v. Pittard, 1 Term Rep., 27; Hyde v. The Trent & Mersey Navigation Co., 5 Term Rep., 389.

depositary. Where, however, he voluntarily and officiously proposes to keep the goods of another, there is a sound reason why he should be held to a stricter liability, since by his own act he may have prevented them from being stored in safety. If he press himself into the undertaking, or make an express agreement to keep them safely, he must, in honesty, exercise ordinary prudence in its fulfillment.

When the relation so far changes that both parties derive an advantage from the contract, it is easy to perceive that the liability must change proportionably, as where property is hired to be used, and a compensation is paid for the use. Here there is no inequality between the owner and him who receives the property in trust. The price of the hire balances the use, so that neither owes to the other any special obligation. The contract between them is one of ordinary business, from which both derive a benefit of profit or convenience. In the employment of property received under such circumstances, it is obvious that the hirer can only be held responsible for the use of ordinary care and common prudence in its preservation. It has sometimes been said, that he is bound to the exercise of all imaginable care of goods so received; but the rule established by the harmonious consent of nations[1] does not go so far. If he exercise the common vigilance which the generality of mankind take of their own property, it will protect him from liability. In the absence of an express agreement, the law implies nothing strained or unreasonable; it is satisfied with the usual and ordinary care incident to the custody of another's goods.

In the negotiation for hire, it is presumed that a fair price was given for the use of the thing hired, and that the hirer undertook to keep it with reasonable care. Nothing extraordinary, as to the manner of keeping or using it, can be presumed to have entered into a contract so common.

Property received with a commission or authority to do some act in relation to it, as when one receives money to use in a particular way, imposes the palpable and plain duty

[1] Jones on Bailm., 86.

of faithfully executing the trust. Though no compensation be paid for the service, the commission must be faithfully executed, and the person undertaking it is understood to stipulate that he will exercise the necessary labor and skill in its execution. Receiving no recompense, if he undertake and execute the trust in good faith, he cannot be held responsible for the issue of the business. He must act with prudence, doing nothing by which his employer may suffer damage, and omitting to do nothing which the nature of the act requires.[1] The profession or business of the employee, it is true, may sometimes affect his liability. A surgeon, for example, is presumed to possess competent skill, and though he receive no compensation, he may be held liable for any damages which may be sustained through his malpractice. He is employed and trusted on account of his supposed professional skill, and must answer for the want of it. The law does not allow him to hold himself out to the community as qualified for a business of which he is ignorant. But if a man be employed to act as such on an emergency, who is not a surgeon and does not assume to possess competent skill, he is only responsible for the exercise of his best ability.

One who takes property in pledge for a loan of money or a debt due, as well as he who receives it with the view of bestowing labor upon it in order to make it more valuable, assumes the responsibility of keeping it safely. The ground of liability in each case seems to be the trust reposed in the person who receives the property. The manufacturer receiving wool to be converted into cloth, upon an agreement for compensation, retains a lien upon the goods until it is paid. The custody is equally for the benefit of both parties. So also in the case of pledging; the contract is one of reciprocal advantage. The debt perhaps is contracted on the understanding that the property shall be taken in pledge for its payment; or, the debt being due, its payment is postponed on the receipt of the pledge. The one party gains a credit and the other security by the contract. The principle of

[1] Jones on Bailm., 53.

liability is therefore the same as in a hiring for use, and the bailee is responsible for ordinary neglect, and for every departure from the terms of the agreement. It is also a rule of law, as well as of common equity, that whatever is accessary to the thing pledged shall accrue or be applied to the benefit of the owner; if it be a bond and mortgage, the interest growing due on them shall be credited to him on the debt for which they are in pledge.

The common carrier's liability, grounded on the hire he receives, is extended by the policy of the law much beyond that of an ordinary bailee. His agreement to carry and deliver the goods at the place of destination may be discharged without performance only in three instances, namely, when they are destroyed by the act of God, by public enemies, or by the conduct of the owner himself. The reason of this rule, it is said, is the public employment exercised by the carrier, and the danger of his combining with robbers, to the infinite injury of commerce and extreme inconvenience of society.[1] This language, it seems to us, rather expresses the reason why the principle was adopted into the common law, than the more general reason of public convenience by which it is continued. The true commercial reason is more accurately expressed in the case of Riley v. Horne:[2] "When goods are delivered to a carrier, they are usually no longer under the eye of the owner; he seldom follows or sends any servants with them to the place of their destination. If they should be lost or injured by the gross negligence of the carrier or his servants, or stolen by them, or by thieves in collusion with them, the owner would be unable to prove either of these causes of loss. His witnesses must be the carrier's servants; and they, knowing that they could not be contradicted, would excuse their masters and themselves. To give due security to property, the law has added to that responsibility of a carrier which immediately arises out of his contract to carry for a reward, namely, that of taking all reasonable care of it, the responsibility of an insurer. From

[1] Jones on Bailm., 107.

[2] 5 Bing. R., 217.

his liability as an insurer, the carrier is only to be relieved by two things, both so well known to all the country, when they happen, that no person would be so rash as to attempt to prove that they had happened, when they had not; namely: the act of God, and the king's enemies."

The difficulty of following the property, and in case of loss establishing by evidence the liability of the carrier, seems to be the true ground of the rule; especially since it matters little what principle prevails, so long as the parties to the contract make their agreement with reference to it. The added liability of an insurer, being perfectly understood, is taken into the account in fixing the price of transportation; thus in fact the law is stringent in its requirements and at the same time just. It is made the interest of the person having the custody of the goods to keep and convey them safely, so that the carrier, on whom rests the duty, has the interest in and the means of carrying them safely to the place of delivery. No other principle, it may be safely asserted, would so completely unite commercial convenience and economy with the strict demands of private justice.

The common carrier is by virtue of his occupation a servant of the public, whose duties and responsibilities are regulated with a view to the promotion of the interests which he serves, and are founded upon universal rules of commercial policy. These rules, that have grown up out of usages and customs handed down from the rudest periods, have been corrected and qualified by the experience and wisdom of each succeeding age, so as to form at the present time a singularly consistent system of law.

Innkeepers are in like manner and to a like extent liable for the goods of guests stopping with them. In the usual language of the books they are insurers of the property, and nothing but the act of God or public enemies will excuse a loss.[1] In consideration of exercising the public business of innkeepers, they are bound to receive and entertain strangers and travelers, and answer for their goods. In part

[1] Grinnell v. Cook, 3 Hill, 488.

requital of this unusual liability, the landlord has a lien on the goods for his reasonable charges. The relation of landlord and guest, however, must exist before either the lien or liability can arise. Indeed, the lien and liability are coincident, the one supporting the other, and both standing and falling together. The extraordinary responsibility of an innkeeper, like that of a common carrier, is based on a principle of public policy, sustained by motives of general utility. The stranger cannot be supposed to have at his command the means of showing the precise negligence by which his goods may have been lost. He is compelled to trust to the care of others, without having the means of ascertaining personally the prudence and care of those to whom he confides his property. And hence the law wisely casts upon the landlord the burden of answering for the loss against which he has the best means of providing. The presumptions of the law are thrown against him, in order that his interest may stimulate his vigilance in the safe keeping of property committed to his custody.

While there is no injustice in this rule, since the inkeeper carries on his business with a perfect knowledge of his liability, there is at the same time the highest public convenience. The exhausted traveler, relieved from care, finds at his inn his needed repose, and sleeps in security under a watchful care, presided over and enforced by a strict law.

The several degrees of diligence required of the bailee in the care of property intrusted to him under different circumstances, and the kinds of negligence for which he may become liable, require to be carefully marked and fixed in appropriate terms. The language of the law must have a uniform standard value, a sort of technical and scientific precision. In ordinary speech, it is sufficient to say that the person having the custody of property must keep it with *diligence;* but it will not suffice in legal reasoning. Its meaning varies and is relaxed or intensified too much, according to the notions of responsibility entertained by the person using it. The idea expressed by it is not a fixed quantity, but rather a quality of attention, differing as much as men

differ in the care they take of property entrusted to them. It varies also in respect to the object in reference to which it is to be employed.

Now it is necessary that the terms used to designate the common mode or standard of diligence, should have a fixed, constant and determinate meaning. The principle which is itself uniform, it is important to express in a manner at once uniform and certain. Accordingly we find that writers on the law of bailments have adopted the terms, *ordinary diligence*,[1] to express that degree of care required of the bailee, who derives a benefit from the trust; namely, the care which every person of common prudence and capable of governing a family, takes of his own concerns.

The converse of this, that is, the omission of that care which every man of common prudence and capable of governing a family, takes of his own concerns, is termed *ordinary neglect.*

Slight neglect is the omission of that diligence which very circumspect and thoughtful persons use in securing their own goods and chattels.

Gross neglect is the want of that care which every man of common sense, how inattentive soever, takes of his own property.

[2]Strictly speaking, the law does not allow neglect of any kind in the execution of a contract. Its rule varies only in respect to the care it exacts under varying circumstances. The borrower must be very circumspect and careful of goods and chattels, the use of which he receives gratuitously. The relation in which he stands makes it appropriate that the law should be construed rigorously against him for his acts of neglect. Having received a favor, it is adjudged a great fault in him to be guilty of even a slight negligence, through which the confidence and trust reposed in him are converted into an injury to his friend. In effect these differing degrees of neglect are only so many accents of mildness or severity in which the law, according to the attending circumstances,

[1] Jones on Bailm., 118, 119. [2] Story on Bailm., § 17.

pronounces the same principle of equity.[1] Where the contract is one of ordinary business and gainful to both the parties to it, no special care is required, and common prudence will satisfy the rule of liability. And in the case of a naked deposit, without reward, the construction becomes still more favorable to the bailee, whose situation with reference to the goods does not impose upon him the same watchful diligence usually bestowed on property stored for hire. In all cases, indeed, there is an admirable and intimate relation between the duty of the bailee and the consideration he receives as a reward, or as a motive for entering upon the execution of the trust.

The principles embraced in the law of bailments, originally in a great measure derived, like our principles of equity, from the civil law, compose a system of a somewhat complex nature, involving many nice distinctions, and a great variety and extent of interests. Contracts implied by law, manifestly must be modified by the customs and course of trade. Liabilities imposed by public policy, must be enforced with a wise reference to the conservation of the general interest.

Engagements of a voluntary nature, fairly entered upon, are to be carried into effect equitably and in good faith; and the numerous trusts accompanying the delivery and possession of personal property, modified as they are by the circumstances of each case, and guarded by well defined principles of law, evidently require a high degree of care in their enforcement. On the principle that no man can be wiser than the law, it is evident that only legal reasoning can be of service in its elucidation. The appeal must be constantly made to the reported decisions of the courts, which the great

[1] In its true and genuine meaning, equity is the soul and spirit of all laws. *Positive* law is construed, and rational law is made by it: in this, equity is synoymous with justice; in that, with the true sense and sound interpretation of the rule. 3 Black. Comm., 429.

A sentence from Hooker is very often quoted as expressing the highest idea of abstract and pure law. "Of law no less can be acknowledged than that her seat is the bosom of God, and her voice the harmony of the world; all things in heaven and on earth do her homage, the very least as feeling her care, and the greatest, as not exempt from her power."

master of English jurisprudence has so happily termed the witnesses of the law. From a fair canvass of these witnesses we shall derive the elements and principles which go so far to make up the main body of our laws of bailments.[1]

[1] In the infancy of our common law system, judicial decisions rested solely on the oral testimony of *suitors* or *witan*, who bore witness to the judgments which they or their predecessors had pronounced. They remembered and recorded them. In progress of time their judgments were committed to writing as records of court, and to give them greater publicity, they were at length put forth periodically in the shape of reports. Warren's Law Studies, 404.

CHAPTER II.

ON DEPOSITS.

When chattels are delivered by one man to another to keep for the use of the bailor, it is called a deposit; the essential characteristic of the contract is that the keeping be gratuitous.[1] The person receiving the goods to keep, impliedly stipulates that he will take some degree of care of them; but the degree of care is to be measured by the watchfulness with which he preserves his own property of a like kind.[2] He must observe good faith in keeping them as he keeps his own property. If they be lost or injured by his gross neglect, or a violation of good faith on his part, he is responsible for the damages sustained.

There are various kinds of deposit, voluntary and involuntary. An involuntary deposit is a delivery of goods, usually made under an emergency, such as shipwreck, fire or flood, which leaves to the owner of them no time for deliberation or choice. There is also in the civil law a species of bailment called sequestration, which is a delivery of property under a judicial order,[3] or a deposit made by agreement, in the hands of an indifferent person, between the parties engaged in litigating the title, until the same shall be determined, with a stipulation on the part of the bailee that he will deliver the same to the party to whom it shall be adjudged. The rule of responsibility does not vary so long as it remains a naked deposit without reward.[4]

[1] Code of Louisiana, Art. 2900; Story on Bailm., § 4, 41; 2 Kent's Comm., p. 560.

[2] Foster v. The Essex Bank, 17 Mass., 479.

[3] Code Louisiana, Art. 2942.

[4] Story on Bailm., §46.

It should be observed that only chattels personal, or things movable, which are capable of being delivered, can be the subject of deposit or bailment of any kind. These include every thing that can properly be put in motion, and transferred from place to place; thus by the Code of Louisiana, the object of deposit must be properly some movable thing, but slaves may also be deposited.[1] Negotiable notes and bills of exchange, the title to which passes by delivery, may become the subject of deposit; and so may also title deeds, choses in action and evidences of debt. The value of the deposit in such cases depends upon the force given to it by the principles of law,[2] but the bailment is complete though though the actual value of the thing deposited be very small.

Contracts implied by law are such as reason and justice dictate, and which therefore the law presumes that every man has contracted to perform; and upon this presumption makes him answerable to such persons as suffer by his non-performance.[3] As in the contract social, every man is presumed to have stipulated that he will perform all the duties which natural justice may require of him, and discharge faithfully the obligations arising out of his relations to the community. As these relations are multiplied by the numerous transactions of business, the law amplifies its remedies for the violation of duties growing out of them;[4] for wherever the common law gives a right or prohibits an injury, it also gives a remedy by action.[5] Though this admirable theory may sometimes fail in its practical application, it is yet useful to be borne in mind in the study of the principles

[1] Art. 2899, Code of Louisiana.

[2] Rutgers v. Lucet, 2 John. Cases, 93. An agent receiving a bill of exchange as bailee from another, to be credited to his principal in other transactions, or to return the bill, is liable for the amount of the bill if such credit be obtained and the means of paying it pass through his hands.

[3] 3 Black. Comm., 159.

[4] Warren's Law Studies, 416.

[5] Per Holt, C. J., in Ashley v. White, 1 Salk., 21; Hunt v. Dorman, Cro. Jac., 478; 3 Black. Comm., 109, 123, and 1 East, 229. "Unless it be shown by authority, that the action does not lie, we must presume that it does, upon the principle of justice that where the law gives a right, it also gives a remedy."

that regulate the manifold relations growing out of the daily business of life, as well as the wider operations of commerce.

An implied contract is proved by circumstances, by the general course of dealing between the parties, by the general usage and custom of any particular place or trade, or by the delivery of goods for a special purpose; and where it is once raised by law, it is enforced in the same manner as an express contract.

Parties to the Contract.

All persons, except those who are disabled by law, are capable of contracting. Married women as a rule, infants and persons of unsound or deficient mind, are incapable of binding themselves by agreement. Under the common law, except so far as it may be modified by statute, the legal existence of the wife is merged in that of the husband, and they become one person in law.[1] If persons enter into contracts with her, the law shields her from any liability on them as such,[2] and it has even been held that if she retain counsel in a suit prosecuted by her for a divorce, she is not liable to him in an action for his fees, unless subsequent to the divorce she promises to pay.. She cannot bind herself personally by covenant or contract during coverture.[3] But if property be given into her charge without her husband's consent, he is bound to restore it, it having come into his possession.[4] In this case, however, the obligations of a depositary do not rest upon him. His liability to respond rests on the same ground as that of the person who has come into the possession of the personal property of another by finding.

After the goods come into the custody of the husband, though the law raises no contract of bailment from the fact of their delivery to his wife, it is evident that if he voluntarily retain them, knowing the purpose for which they were

[1] Black. Comm., 441, and Story on Contracts, § 83.
[2] Wilson v. Burr, 25 Wend., 386; 5 Taunton, 37.
[3] Jackson v. Vanderheyden, 17 John., 167.
[4] Story on Bailm., § 50.

received, he will be responsible at least for any gross neglect by which they shall be destroyed or lost. His voluntary act of retaining them makes it reasonable that he should be compelled to keep them with a degree of care equal to that required of the finder, who also voluntarily takes goods into his custody.[1]

It is not precisely accurate to say that an infant is not capable of entering into a contract. His capacity to contract is good enough, and the agreement he makes, though it cannot bind him personally, will bind all those who enter into it with him. The law in substance gives to an infant the personal privilege of repudiating his contract, while it at the same time holds his agreement a sufficient consideration to sustain undertakings made to and with him. His acts are not void, but merely voidable; until he repudiates them they remain good. No other person can take advantage of his privilege; his promises have not in themselves the essence of a contract, that is obligation, yet they constitute a sufficient consideration for a mutual promise by another; and also a sufficient consideration for a new promise by the infant, when he shall be capable of making a valid promise. He may disavow his acts done, and cannot be compelled to perform prospective acts which he has stipulated to execute. The former are, properly speaking, voidable, and the latter in respect to their binding force on him, are simply void.[2]

It is not material here to consider in what cases an infant may make a valid contract, as for necessaries and the like. These exceptions can seldom bear upon the contract of bailment. It is important, however, to bear in mind, that infants are liable in the same manner as adults for trespass, assault and fraud.[3] The contract of an infant is not void but is voidable at the election of the infant. If a horse is let to him to go a journey, there is an implied promise that he will

[1] 2 Bulst, 306.

[2] Mason v. Denison, 15 Wend., 64.

[3] Bullock v. Babcock, 3 Wend., 391; Wallace v. Morss, 5 Hill, 391; Cary v. Hotailing, 1 Hill, 311, and 317, Olmstead v. Hotailing.

make use of ordinary care and diligence to protect the animal from injury, and return him at the time agreed upon. A bare neglect to do either, would not subject him, or an adult, to an action of trespass, the contract remaining in full force. But if the infant does any willful and positive act, which amounts to an election on his part to disaffirm the contract, the owner is entitled to the immediate possession. If he willfully and intentionally injures the animal, an action of trespass lies against him for the tort. If he should sell the horse, an action of trover would lie, and his infancy would not protect him. The case of Vasse v. Smith, in the Supreme Court of the United States (6 *Cranch's Rep.*, 226), was decided upon this principle.[1]

In respect to executed contracts, if the infant on coming of age choose to avoid them, he is bound to restore the consideration.[2] The law guards and protects him on the assumption of his youth and incapacity, from liability arising directly on his contract, but it will not permit this personal privilege to be converted into an instrument of fraud. In like manner, if goods be delivered to him on deposit, though the law does not imply a binding contract on his part to keep them, as in the case of an adult, yet if he injure them by some positive act of fraud or violence, he is responsible. Simple want of care, it seems, will not render him liable, since that, under the law of bailment, is the subject of stipulation, either express or implied.[3] The bailor, like every other person, contracts with him subject to the law, conferring upon him the right to annul or rescind the agreement.

Persons of unsound mind and memory cannot enter into a binding contract. There are four kinds of persons whom the law recognizes as *non compos mentis*, and incapable of contracting: 1. Idiots, who are such from birth by a perpetual infirmity. 2. Those who by sickness, grief, or other accident, wholly lose memory and understanding. 3. Lunatics, who sometimes have, and sometimes have not understanding,

[1] Campbell v. Stakes, 2 Wend., 137.
[2] Roof v. Stafford, 7 Cowen, 179.
[3] Story on Bailm., § 50.

and are therefore incapable, so long as the infirmity continues. 4. Lastly, they that for a time deprive themselves by their own vicious acts, of memory and understanding, as they that are drunken.[1] None of these, while so afflicted, have what is termed discourse of reason. An idiot is one who has not any use of reason, has no understanding to tell his age, who is his father or mother, or what shall be for his profit and loss; for he "is not an idiot if he hath any glimmering of reason, so that he can tell his parents, his age, or the like common matters."[2] Lunatics are such as occasionally labor under fits of insanity, and can enter into contracts only during lucid intervals. Those who have lost their understanding by calamity, or besotted and demented themselves by drunkenness, are regarded as incapable of discharging the ordinary duties of life.

The presumption is, always, that the person entering into a contract, is of sound mind and capable of contracting. The disability must be established by evidence; it is treated as an exception to the general rule. The principle and the reason on which it is founded, are stated with force and clearness by Senator Verplanck in the case of Stewart's executor v. Lispenard:[3] "The substantial and obvious reason of the invalidity of the wills of persons of unsound mind, as well as of their other contracts and legal engagements, is their inability to consent, with knowledge, to the act or bequest. This is clearly stated, with all the lucid succinctness and generality of a legal aphorism, by Sir John Nichol. Want of reason must of course invalidate a contract, the very essence of which is consent. It is not material whether the want of consent arises from idiocy or lunacy. (2 *Phill. R.*, 70.) Now the imbecile and feeble mind has the power of consent to matters within its comprehension, and may commonly comprehend the general disposition of property, relying upon the advice and aid of those friends upon whom expe-

[1] Stewart v. Lispenard, 26 Wend., 299.
[2] 1 Black. Comm., 304.
[3] 26 Wend., 225.

rience has taught it to rely safely for the prudence of details and the legal effect of the transaction, just as the unlettered or the infirm must do in many of the transactions of life, whatever may be their mental acuteness and activity. In some particular transaction its facts and nature make it clear that the matter was not comprehended by a dull and ignorant mind, and that therefore his consent was wanting; nevertheless such want of consent cannot be presumed of course, as a presumption of evidence as to any one who has the humblest use of reason. Again, taking mankind, such as observation shows us human nature to be, can any other than this be a safe, prudent, just or politic rule? When we observe the strange incongruities of human character—the astounding mixture of sagacity and weakness in the same mind—'the fears of the brave and follies of the wise'—when literary biography shows us the discoverers of truth and the teachers of wisdom, like Newton and Pascal suffering under 'the variable weather of the mind, the flying vapors of incipient lunacy'—when in ordinary life it often happens that the most sagacious and prudent in many of the affairs of business, are yet in some point of domestic conduct, or some one matter of opinion or action, guilty of absurdities such as the feeblest minds could not commit, one might almost adopt the startling conclusion of Dr. Haslem, who, after years of professional observation of the phenomena of mental disease, when examined in the remarkable case of Miss Bagster, in answer to the customary question, was Miss B. of sound mind? replied, 'I never knew any human being who was of sound mind.' So again; if we look around our own circle of acquaintances, every one must have known aged, blind or infirm persons, unfitted by the state of their minds, or of their senses, for the management of any affairs, and from their necessary seclusion from the concerns of life, entertaining false notions and mixing up the past with the present. Yet these and such as these, may by the aid of their friends and families, upon whom they have a right to rely, and with a general understanding of their own interest and the effect of their acts, make wills, conveyances and other dispositions

of property (by contract), which could not be set aside without gross and manifest hardship and injustice. To establish any standard of intellect or information beyond the possession of reason in its lowest degree, as in itself essential to legal capacity, would create endless uncertainty, difficulty and litigation, would shake the security of property, and wrest from the aged and infirm that authority over their earnings or savings, which is often their best security against injury and neglect. If you throw aside the old common law test of capacity, then proofs of wild speculations, or extravagant and peculiar opinions, or of the forgetfulness or the prejudices of old age, might be sufficient to shake the fairest conveyance, or impeach the most equitable will. The law, therefore in fixing the standard of positive legal competency, has taken a low standard of capacity; but it is a clear and definite one, and therefore wise and safe. It holds, in the language of the latest English commentator, that weak minds differ from strong ones only in the extent and power of their faculties; but unless they betray a total loss of understanding, or idiocy, or delusion, they cannot properly be considered unsound." (*Shelford on Lunacy*, 39.)

This able opinion was delivered in a case touching the validity of a will; but the law makes no distinction between the legal capacity required to make a will, and that necessary to enable the party to enter into a binding contract. Where goods come into possession of one who has no capacity to contract, under such circumstances, as in the case of a person capable of contracting, raise an implied undertaking to keep them safely, though no contract arises, the goods can be recovered by the owner. The right of possession follows the title; and if the custody of the property have been parted with through misapprehension, for a time and purpose specified, the property can be retaken. It can even be repossessed immediately, as we have seen in the instance of bailment for hire to a person incompetent to contract.

A lunatic, though incapable of committing the moral wrong of trespass, is nevertheless answerable in his estate

for the injury he commits. Under the statute of this state, which gives damages recoverable in the name of the executor or administrator of the deceased, for the destruction of life through carelessness or by any wrongful act, a lunatic has been held responsible. The case is not reported, but it was so decided at a general term of the supreme court in Albany, and is supported by many other cases adjudicated upon the same principle. The law in such cases demands of the lunatic only the actual damages, to be satisfied out of his estate; in other words, it leaves his misfortune to rest upon him to the extent of the injury he commits, within the limits of his pecuniary responsibility.[1]

The Finder.

The finder of personal property is not compelled by law to take the same into his custody; but if he voluntarily assume the charge of it, the law imposes upon him the duties of a depositary,[2] so far at least, that he is answerable for gross negligence. The action of trover so long in use, was designed expressly for the recovery of property by the owner from the custody of the person, into whose hands it may have lawfully come, as by finding, the important fact in the case being the act of conversion; that is, the exercise of some act of ownership or control over the property in exclusion of the legal owner. In that form of suit, in general, only the two questions of title and conversion were litigated. A careful examination, however, of the decisions in the action of trover will show that the finder is, and upon principle ought to be, held responsible for the care of the goods so received. The law, in fact, gives him a special property in them, and he may maintain a suit against any one who shall convert them except the rightful owner;[3] having the right and the means of protecting the property, it is but reasonable that he should be required faithfully to exercise and use them. Where a

[1] Mull v. Kelly. See Session Laws of 1847, ch. 450, p. 575; see also Session Laws of 1849, ch. 256, p. 388.

[2] Story on Bailm., § 86, 87; Cory v. Little, 6 N. Hamp., 213.

[3] McLaughlin v. Waite, 9 Cowen, 670.

right is conferred, it is a general principle of both law and equity, that the person or party in whom it is vested shall be required to exercise it in good faith, so as to carry out the purpose for which it is given.[1]

The action of trover, which always assumed that the property in question came lawfully into the defendant's possession, was frequently brought and sustained for the injury suffered by the misuse, or disposition of it contrary to orders. Every direct act of authority, amounting to an assertion of title, every breach of the express or implied trust on which it was received, and every abuse of the lawful possession, has been repeatedly held a conversion of the property.[2] These familiar principles are applicable both to chattels and to choses in action.[3] It seems, also, that the finder, who takes straying property and keeps it for the owner, and is thereby put to necessary expense in securing it, has a right to be refunded such expense. This certainly could not be the case unless the law at the same time cast upon him the duty of taking care of it.[4]

The general doctrine of the common law is that the person who takes an *estray*, cannot levy a tax upon it, by way of amends or indemnity.[5] In very early times, indeed, when the king was at best only a common robber, a different principle prevailed in relation to wrecks and property cast upon the land from disabled vessels; the king in such cases being the strongest, was adjudged the owner.[6] Acts of that nature are in this age branded as piracy.

A mere servant has not such a special property as will enable him to maintain trover, yet a bailee, or trustee, or any other person who is responsible to his principal, may maintain the action, and the lawful possession of the goods is prima facie evidence of property.[7] The finder, as we have

[1] The Mayor, &c. of New York v. Furze, 3 Hill, 612.
[2] Baldwin v. Cole, 6 Mod., 212; M'Combie v. Davies, 6 East, 540.
[3] Murray v. Burling, 10 John. R., 172; 2 Esp. N. P., 190.
[4] Amory v. Flyn, 10 John. R., 102.
[5] 1 Roll. Abr., 879, C., 5; Noy's Rep., 144; Salk., 686.
[6] 1 Black. Comm., 291.
[7] Faulkner v. Brown, 13 Wend., 63.

seen, may maintain the suit in defending them, and hence it follows that he is responsible for the exercise of that degree of care over the goods for which the law clothes him with this right. The person who secures timber carried down a river by flood, performs what is legally termed a meritorious act, for which he is entitled to compensation from the owner,[1] and having once taken it into his keeping, he is responsible for reasonable care. It does not seem to be absolutely settled whether the right of compensation, in such a case, becomes a lien upon the property, or only remains a naked right of action as for a reasonable recompense. In the case of Amory v. Flyn, it is assumed that a lien attaches for the necessary expenses incurred in the taking and keeping of the property; and the principle seems at once both equitable and convenient. The right of compensation being established, there is no good reason why it should not be paid on the delivery of the property.[2]

Those who rescue vessels or goods abandoned in distress at sea, are entitled to a reasonable reward for their services, known as salvage, in the maritime law. The claim arises for the saving of the vessel or goods from loss at sea, either by shipwreck, fire, or other distress; by public enemies or pirates. The amount of compensation is estimated and ascertained in every case by the compound consideration of the danger from which the vessel or goods have been rescued, and the extent and importance of the service rendered. The value of the property saved from loss, is an essential circumstance in estimating the value of the service. Though the goods in such cases come into the posession of the salvors in a manner analogous to the finding of strayed or lost property on the land, so as to be appropriately mentioned in this connection, the possession is of a different character; the right of compensation arises out of the labor rendered in their rescue from the perils of the sea, and attaches always as a lien upon the property.[3] No right to salvage arises unless

[1] 2 H. Bl., 254, 258.

[2] 1 R. S., 3d ed., 401.

[3] Hartford v. Jones, 1 Ld. Raym., 393; Abbott on Shipping, 356; Hand v. The Elvira, Gilpin, 60

the property be in fact saved,[1] and the care of its preservation of course devolves upon the persons claiming it, until the claim is satisfied and the lien discharged. The material circumstances here, accompanying the rescue and preservation of the property, closely resemble those of lost property taken by the finder and preserved with care.

The Consideration.

In every contract there must be a good consideration on which the express or implied undertaking rests, as upon a necessary support; a naked promise being in itself simply void, *nudum pactum*. The general rule is that to make a contract or agreement obligatory, the consideration must be either a benefit to the party promising, or some trouble or prejudice to the party to whom the promise is made; otherwise there is no agreement that can be enforced. Thus, for example, mutual promises support each other, the receipt of money for the use of another raises and supports, the promise to pay it over, and services performed render good the promise of payment therefor.[2] The act of entrusting a thing with another, and his undertaking the care of it, the law considers a sufficient consideration for his faithful discharge of the trust. The custody of the property is parted with on the faith of the owner in the integrity and care of the person to whom it is delivered; and though he engages to keep it gratuitously he is responsible for a faithful execution of the trust reposed in him, on the ground that his failure to keep the promise made, or the undertaking implied by law, works an injury or prejudice to the party with whom the agreement is made. The maxim *ex nudo pacto non oritur actio*, borrowed from the civil law, does not apply in this case; for there is an act, promise or undertaking, by each of the parties to the contract, sufficient to render it valid and binding.

[1] Clark v. The Brig Dodge Healy, 4 Wash. C. C., 651.

[2] 1 Comyn on Con., 12, 15, 16; Chitty on Contracts, 26, 27; 7 Conn. R., 57; 9 Cowen R., 778; 4 John. R., 235; 2 Black. Comm., 444, 445; Miller v. Drake, 1 Caines, 45; Powell v. Brown, 3 John. R., 100; Forster v. Fuller, 6 Mass. R., 58; Randle v. Harris, 6 Yerger R., 508; 11 Verm. R., 315.

A written instrument, acknowledging the receipt of a quantity of wheat in store, imports a contract of bailment; and though in the form of a receipt, it is not open to contradiction in the sense of the rule applicable to receipts proper.[1] But a usage of trade among dealers in the article, may control the meaning of the terms, provided it is shown to be so universal and well known that the jury are bound to consider it parcel of the contract. So, likewise, a memorandum acknowledging the receipt of a quantity of grain on freight, is regarded as a contract, a bailment; imperfect as the memorandum may be, if enough appear upon its face to make out a contract, its terms must prevail, unless modified by clear proof that these have a particular meaning attached to them by the usage of trade—a usage known to the party at the time of contracting, or which he is presumed to have known and assented to.[2]

Sheriffs and Receiptors.

A sheriff levying upon goods must use due diligence to keep them safely to satisfy the execution. But he is not an insurer, and is not, like a common carrier, answerable for a loss of the goods by fire. His capacity as an officer is not considered as fixing a more rigorous measure of liability upon him than if he were a private person. The rule has been held more stringent in respect to receivers, county treasurers, postmasters and revenue officers.[3] These having charge of money or property by virtue of a public office, for the discharge of the duties of which they receive compensation, are regarded as bailees for hire.[4]

Where an officer, having levied upon and taken possession of property, delivers it to a third person and takes his re-

[1] Goodyear v. Ogden, 4 Hill, 104.

[2] Witherell v. Gartham, 6 T. R., 398; Bushforth v. Hadfield, 6 East, 519; Cooper v. Kane, 19 Wend., 386; Dawson v. Kittle, 4 Hill, 107.

[3] Browning v. Hanford, 5 Hill, 591, per Justice Cowen.

[4] 5 Hill, 591, per Justice Cowen; Knight v. Plymouth, 3 Atk., 480; Supervisors of Albany Co. v. Dorr, 25 Wend., 440; Burke v. Trent, 1 Mason, 96, 101, 102; Story on Bailm., § 130, 620.

ceipt therefor, to be delivered when called for, the receiptor assumes the liability of a naked bailee, and is bound to produce the property, on demand, at the place specified in the receipt. Until demand is made, no action can arise, for that is parcel of the contract.[1] The receiptor's liability in such a case is simply that of a depositary, for gross negligence only; since he gives nothing for the use of the property and receives nothing for taking care of it.[2] Though liable for its delivery according to the terms of the receipt, he has not, it was formerly held, such a special property in the thing intrusted to his care, as will enable him to maintain an action against a stranger who takes it away, or converts it to his own use. The general property remains in the owner until the sale, and the special property is in the officer making the levy, who may defend the same and maintain an action for its recovery. The receiptor acts as the mere servant of the sheriff and acquires but a limited interest in the property.[3]

The legal reason formerly given why a receiptor may not defend by an action the custody of property intrusted to him, appears certainly a little too technical. His responsibility is clearly equal to that of a bailee who receives goods on deposit without hire, and his pecuniary interest in them is just the same, that is, nothing at all.[4] Taking the goods into his actual possession, and giving a receipt for them, with a promise of redelivery on a day and in a manner specified, creates a contract, binding the receiptor to keep them safely, which the law recognizes and will enforce. And it should seem that when a duty is imposed upon the party contracting, that there should also be accorded to him the adequate means of discharging it, which he clearly has not, if answerable in the case of a forcible dispossession, unless he is able to follow and retake the goods as against a trespasser.

[1] Brown v. Cook, 9 John. R., 361.

[2] Edson v. Weston, 7 Cowen, 278.

[3] Dillenbeck v. Jerome, 7 Cowen, 294; Ludden v. Leavitt, 9 Mass. Rep., 104; Warren v. Leland, 9 Mass. R., 265.

[4] Faulkner v. Brown, 13 Wend., 63.

It is clear that the receiptor's liability can never extend beyond that of the officer; if the property be taken from him by a paramount title, or casually burned up, he is discharged.[1] The demands of justice are fully satisfied by making the receiptor's responsibility to the sheriff commensurate with his liability over to the plaintiff in the execution. And it may well be doubted, says Mr. Justice Nelson, in Harvey v. Lane, whether the receiptor is responsible to the officer to the same extent as the latter is to the plaintiff in the process.[2]

The case of Dillenback v. Jerome,[3] was an action by the receiptor to recover the value of personal property by him receipted to the officer who had levied upon it, but it did not appear on the trial, that either the officer or the receiptor ever took actual possession of the property. Having the property in his actual custody, there can be no doubt that the receiptor may use the necessary force to defend the same against any person who seeks wrongfully to interfere with it. His right to defend it, being derived from the officer making the levy, runs parallel with his obligation to keep the property safely.[4] And it is now settled by the decision in the case of Miller v. Adsit, that he may follow the property and maintain an action for its recovery against the person who takes it wrongfully from his possession.[5] In this case the receiptor is regarded as something more than the mere servant of the sheriff, as having for the time being a rightful possession which he may maintain even in an action of replevin. The current of authorities in this state and also in Massachusetts, prior to this decision, lean to a contrary doctrine.[6]

There are, it appears, as a general rule, only two kinds of

[1] Browning v. Hanford, 5 Hill, 597; Edson v. Weston, 7 Cowen, 278.

[2] 12 Wend., 563.

[3] 7 Cowen, 294.

[4] Browning v. Hanford, 5 Hill, 591, per Mr. Justice Cowen: He (the officer) is of course warranted in delegating his trust, or such a portion of it as the exigencies of business may require, to his servants. In all these respects there is an obvious parallel between his rights and obligations and that of the sheriff.

[5] 16 Wend., 335; 2 Kent's Comm., 568; Cox v. Easley, 11 Ala., 362.

[6] 1 Cowen's Trea., 3d ed., 491, and Smith v. James, 7 Cowen Rep., 328.

property that can be made the basis of an action for its recovery. The law recognizes no third species of property, and hence, as formerly held, it gave no possessory action to the receiptor, who acts as the agent or servant of the officer making the levy. After the levy is made, even the general owner, when the property is left with him, becomes the agent of the officer. In Barker v. Miller, the constable had levied on the goods of one Caswell, and left them in his possession. The defendant took them away. The court said, after seizure on execution, the goods were in judgment of law, in possession of the constable as against a wrong doer; and Caswell, with whom he had left the goods for safe keeping, was no more than his servant. It is the seizure on execution that gives the officer a special property in the goods, and confers on him the right of action. Until the seizure is made he acquires no legal interest in them.[1]

Where a store of goods is levied on, and the receiptor after having receipted them to the sheriff, allows the defendants in the execution to go on and sell them out at retail, it has been held that he is answerable as for gross negligence. Leaving the goods under such circumstances, to be wasted or sold, is not even the slight care required of a bailee without hire;[2] especially where he expressly promises to keep them safely and deliver them when called for, or at a particular time and place specified. In an action against him for the property, he would be estopped from denying the right of the sheriff, who is his principal, and from whom he derives all the right he possesses over the goods. His relation to the officer is analogous to that of the tenant to his landlord, and he is not permitted to deny the right by which he himself holds the property.

Notwithstanding it is a good defence for the receiptor in an action brought against him by the sheriff, that the goods receipted have been taken from his possession by means of a paramount title in some third person, it has been decided that the receiptor cannot in such a case set up title in him-

[1] 2 Saund., 47; Hotchkiss v. M'Vickar, 12 John. Rep., 403.
[2] Phillips v. Hall, 8 Wend. Rep., 610; 7 Cowen R., 278, 294.

self. His contract as receiptor precludes him from making that defence. He is bound to assert his right of property at the time the levy is made. Standing by and allowing his goods to be levied upon as those of another person, thereby throwing the creditor off from his guard and preventing an adequate levy, and then voluntarily giving his written receipt, with a promise of redelivery to the officer, is held an *estoppel in pais*. He is not permitted afterwards to assert even the truth to the prejudice of any person whom he has misled. Mr. Justice Cowen considered this to be the very definition of an estoppel; for the prevention of fraud, the law holds the admission, evidenced by such acts, to be conclusive.[1]

Ordinarily it must appear, that the default and misrepresentation have worked an injury to the party relying on the truth and good faith of the person making them. Thus in Pickard v. Sears,[2] Lord Denman lays down the doctrine in these words: "The rule of law is clear, that where one by his words or conduct willfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." In the Welland Canal Company v. Hathaway,[3] the court say that, as a general rule, a party will be concluded from denying his own acts or admissions, which were expressly designed to influence the conduct of another, and did so influence it, and when such denial will operate to the injury of the latter. The acts and admissions of the party operate conclusively against him, where in good conscience and honest dealing, he ought not to be permitted to gainsay them.[4]

[1] Dezell v. Odell, 3 Hill, 216; Bursley v. Hamilton, 15 Pick., 40. In this case, the plaintiff was estopped from setting up title, notwithstanding he asserted title when he signed the receipt.

[2] 6 Adolph. & Ellis, 469.

[3] 8 Wend., 483.

[4] Cowen & Hill,s Notes to Phil. Ev., 200.

General and Special Property.

One who has the title to any valuable thing, has what is legally termed the general, or absolute property in it. There is also what is known in the law as a special, limited or qualified property. Absolute property in goods, draws after it the possession of them as a construction of law, so that if no adverse right of possession is shown, it is presumed to rest with the owner.[1] A special property arises out of contract with the owner for the temporary use or keeping of goods, or by the operation of law, as already mentioned in the case of a levy by a sheriff on execution.[2] Common carriers intrusted with property for conveyance, have a qualified interest in it sufficient to enable them to defend the same against every body except the rightful owner.[3] This special property in the carrier arises out of the nature and terms of his contract to carry safely and deliver the goods at the place of destination; and the right of action vesting in him accompanies the possession as an instrument for their defence. A special property is likewise vested in the factor to whom goods are consigned for sale, and the right of action accrues to him as against third persons, even before he has acquired the actual possession of them.[4] Commonly, it is true, the possession must accompany the special property in order to raise a right of action in the bailee.[5] Indeed, the rule is, that in order to give the bailee a right of action, he must have both the possession and a special property in the goods.[6] But a possession under the owner, as a common bailee, without hire, is enough as against strangers and wrong doers; where the present right of possession unites with the right of property, either general or special, an action may be maintained.[7]

That the finder of a chattel, though he does not acquire by such finding, an absolute property or ownership, yet has such

[1] 1 Cowen's Trea., 3d ed., 320.
[2] Cary v. Houghtailing, 1 Hill, 311; Root v. Chandler, 10 Wend., 110.
[3] 7 T. R., 12. The carrier has a right of possession against the tort feasor.
[4] Smith v. James, 7 Cow. Rep., 328, and the cases there cited.
[5] 4 East, 214.
[6] Faulkner v. Brown, 13 Wend., 63.
[7] Sutton v. Buck, 2 Taunt., 309.

a property as will enable him to keep it against all but the rightful owner, and consequently may maintain an action for it, are propositions fully established by the case of Armory v. Delamirie.[1] The plaintiff was a chimney-sweeper's boy, and found a jewel, which he carried to the defendant, a jeweler. The stones were taken out by the defendant's apprentice; and it was adjudged that the plaintiff was lawfully in possesion against all the world, except the owner, and might maintain trover. The same doctrine has been often recognized. The rule is different in respect to a chose in action; though the bearer of a note or bill payable to bearer, need not prove a consideration unless he possesses it under suspicious circumstances.[2] Any person in possession of a note endorsed in blank, or payable to bearer, may sue upon it, and *prima facie* he is the owner; but if it appear to the court that he is not the true owner, then he must show that he gave value for it, or received it in the ordinary course of business.

Substantially the same principles are held applicable to the case of a lottery ticket found in the street, and payable to the holder, in these words: "This ticket will entitle the holder to one half share of such prize as shall be drawn to its number." The finder is not the legal holder of this ticket, any more than the person who comes into possession of a note by finding, payable to bearer, is the *bearer*, in law.[3]

Possession obtained in this manner does not *per se* vest the holder with any right of property, and payment, with a full knowledge of the circumstances, is no protection as against the rightful owner. It would be otherwise if the facts were not known at the time of payment.

A naked prior possession of chattels, where nothing else appears to qualify its character, is enough to establish the right of action in the plaintiff, and put the defendant upon showing by what title he claims to hold them.[4] This is upon the principle that posession, until the contrary appears, is

[1] 1 Str., 505; 3 Salk., 365; 1 Taunt., 309.

[2] McLaughlin v. Waite, 9 Cow. Rep., 672, and 7 Cow. Rep., 176.

[3] 9 Cow. Rep., 672.

[4] Duncan v. Spear, 11 Wend., 54.

evidence of title which must prevail, until it is overcome by testimony.

There is another species of qualified property, not directly allied to the law of bailment, which exists in animals wild by nature, when temporarily tamed and subjected to the possession of man; such as a swarm of bees, hawks used for hunting, deer in a park, or fish in a private pond. These, and other like creatures, when reclaimed from the wildness of their nature, are the subjects of property so long they are retained in possession. If they escape and be found at large, under such circumstances as show that they have resumed their natural wildness, the property in them ceases,[1] and any person is at liberty to pursue and seize them as lawful game.

Special Deposits, care required.

Where money is deposited in a bank in the ordinary course of business, it does not raise a contract of bailment. The transaction amounts to a loan without interest, and creates the relation of debtor and creditor; the bank receives the money deposited and undertakes to repay the same on demand at all events. The fund is mingled with other moneys and becomes an absolute debt due from the bank, for which it is liable even though the money be lost, without any fault on its part. It is called a deposit, and formerly, perhaps, it was such in fact; but it is not so now in the usual manner of business. No doubt, if money be deposited in a keg or bag, and specifically receipted to the depositor, with a promise to redeliver to him the identical money so received, it would create a contract of bailment. The property in such a case would still remain in the person making the deposit, and the bank would be liable only for gross neglect, or the want of that care it ordinarily takes of its own funds.[2]

In the case of Foster v. The Essex Bank, the deposit consisted of large quantities of gold, placed in a chest which was

[1] 2 Black. Comm., 391, 392.

[2] Commercial Bank of Albany v. Hughes, 17 Wend., 100.

locked, and left at Essex Bank "for safe keeping," the depositor taking the key with him. The cashier or chief clerk of the bank, fraudulently took of the gold deposited thirty two thousand dollars, and ran away, and it was held the bank was not liable, inasmuch as its officers had taken the same care of the deposit as they did of their own funds without hire. Chief Justice Parker considered that a case of naked bailment, in which the bailee can be held answerable only for gross negligence; which, he adds, bears so near a resemblance to fraud as to be equivalent to it in its effects upon contracts.[1] In another connexion, he states the degree of care which is necessary to avoid the imputation of bad faith, measured by the carefulness which the depositary uses towards his own property of a similar kind, as the rule of responsibility. Sir William Jones tells us that a bailee of this sort is answerable only for a fraud, or for gross neglect, which is considered as evidence of it.[2] And again, he says, a depositary is responsible only for gross neglect, or in other words, for a violation of good faith;[3] thus evidently using these terms interchangeably as practically equivalent to each other. Mr. Justice Story, on the other hand, thinks that this doctrine cannot be maintained, and expresses the opinion that gross negligence is, or at least may be entirely consistent with good faith and honesty of intention.[4] If, however, we bear in mind that the degree of care exacted of the bailee without hire, is to be estimated or measured by that which he takes of his own property of like kind, it is apparent that gross neglect, that is, as we have seen, the want of that care which every man of common sense, how inattentive soever, takes of his own property, approaches very near to a breach of good faith. It is at least a want of positive and active good faith in him, to allow the property to be lost or destroyed through such negligence. Good faith in taking care of the thing intrusted to him, is both legally and morally an active duty; to the degree required by law, he must take

[1] 17 Mass R., 479.
[2] Jones on Bailm., 46.
[3] Jones on Bailm., 120.
[4] Story on Bailm., § 22.

care of the property; and if we suppose Sir William Jones to have used the terms in the sense of fidelity or faithfulness, which they are sometimes used to express, there is not much opportunity left for criticising the language in which he states the principle.[1] Where a person promises, or the law implies a promise on his part, to keep goods or chattels, it is but reasonable that he should be required to discharge the duty faithfully; and it does not seem any abuse of language to speak of the breach of this duty as a breach of good faith. However expressed, it is a failure, or a default, in the keeping of an engagement, for the performance of which his good faith was pledged in vain.

Still it must be asserted that there is a distinction between fraud or a violation of good faith, and gross neglect. If the depositary commit even a gross neglect in regard to his own goods as well as those bailed, by which both are lost or damaged, he cannot be said to have violated good faith, and the bailor must impute to his own folly the confidence which he reposed in so improvident a person.[2] It is to be observed, that the question of good or bad faith is generally one of inference, to be solved by the jury from the circumstances and evidence in the case; it is not in its nature capable of being settled by positive proof. And hence, where the bailee is found guilty of gross negligence, or in other words, the want of that degree of care which the law exacts from him, the presumption is always against his good faith, until he overcomes it by some positive testimony. Thus in the case of Mytton v. Cock,[3] the owner of a cartoon left it in the hands of an auctioneer without any agreement for its safe keeping, redelivery, or reward for the service. And in a special action on the case for not safely redelivering it, but suffering it to be spoiled, it appeared upon the evidence that the painting was upon paper pasted on canvas, and that it was kept by the defendant in a room next to a stable, having a damp wall, which dampened the picture and made it peel.

[1] Jones on Bailm., 46, 118.
[2] Jones on Bailm., 47; Bract., 99, b.
[3] 2 Str., 1099.

Upon this evidence it was left to the jury to say whether there was or was not a gross neglect on the part of the auctioneer. The jury found for the plaintiff; and the court agreeing that the law in this case raises only a promise not grossly to neglect or abuse the deposit, said it was properly left to the jury, whose finding stood as the judgment of the court.

Sir William Jones, whose opinion we have given, in the discussion of this principle, admits that the character of the individual depositary can hardly be an object of judicial discussion; if he be slightly or even ordinarily negligent in keeping the goods deposited, the favorable presumption is that he is equally neglectful of his own property; but this presumption, like all others, may be repelled; and if it be proved, for instance, that his house being on fire, he saved his own goods, and having time and power to save also those deposited, suffered them to be burned, he shall restore the worth of them to the owner. And he goes on to express the opinion, that if the bailee have time to save only one of two chests, and one be a deposit, the other his own property, he may justly prefer his own, unless that contain things of small comparative value, and the other be full of much more precious goods, as fine linen or silks, in which case he ought to save the more valuable chest, and has a right to claim indemnification from the depositor for the loss of his own.[1]

The law requires of the depositary good faith in the keeping of the thing deposited, as his own goods; and gross negligence is not consistent with his legal duty. If loss or damage occurs from his gross neglect, his liability arises as a presumption of law, unless he shows affirmatively circumstances that go to establish his good faith, as that his own goods have been injured in like manner and through like neglect,[2] and it follows that where good faith is clearly shown, the liability is discharged. The fact that the bailee performs a gratuitous service in the keeping of the goods without any special agreement to keep them safely, relaxes so far the

[1] Jones on Bailm., 46, 47.

[2] Jones on Bailm., 47; 2 Kent's Comm., 562.

rule of liability against him as that the usual and ordinary prudence he bestows upon his own property will protect him. If the depositor desire any greater care, it is reasonable that he should render some compensation for it, or at the least stipulate expressly for safe keeping.

It was at one time held that the delivery of goods, to be safely kept, and the taking charge of them on that agreement, by accepting such delivery, did not create any greater liability than a simple deposit without any stipulation; on the principle sanctioned by the high authority of Lord Coke, that to keep and to keep safely, are one and the same thing.[1] But the contrary doctrine, that the bailee without hire may modify his liability so as to lessen or enlarge it, is clearly settled.[2] There is no reason that can be assigned why the depositary should not be as much at liberty to stipulate for a restricted liability as an ordinary bailee for hire. And it is expressly held, in the case of Alexander v. Greene, that bailees for hire, other than innkeepers and common carriers, may stipulate for a different degree of liability from that to which they would be subject in the absence of an express contract.[3] And in Coggs v. Bernard, Chief Justice Holt, after thoroughly reviewing all the authorities on the subject, expresses the decided opinion that the dictum of Lord Coke, to the effect that there is no difference between an undertaking to keep and to keep safely, is not sustained by the decisions, nor based upon any just and honest reason.[4] Though the bailee for hire may limit his liability by special agreement, he cannot carry his stipulation so far as to make it a protection from responsibility in a case of fraud.[5] He is not permitted to stipulate for immunity in the commission of fraud; and it is doubtful whether he will be allowed to stipulate against

[1] 2 Ld. Raym., 910; 4 Rep., 83, b.

[2] Story on Bailm., § 33; Jones on Bailm., 42; Willes R., 118.

[3] 3 Hill, 9.

[4] 2 Ld. Raym., 909.

[5] Alexander v. Greene, 3 Hill, 9. This case was differently decided on appeal, 7 Hill, 533; but it is difficult to say what principle was established on the appeal; see 2 Comst., 204; Jones on Bailm., 21; Foster v. The Essex Bank, 17 Mass. R., 479.

being held liable for his own gross neglect, which has been often asserted to be inconsistent with good faith, and the evidence or the equivalent of fraud itself. Strictly speaking, it is not the equivalent of fraud, but an evidence of it so strong as to be difficult to overcome.

In the civil law gross neglect was treated as equivalent to fraud; but the common law, under which different tribunals or branches of the same tribunal pass, one upon the principle, and the other upon the conclusions to be drawn from the evidence given in each case, does not pronounce absolutely upon a question which must be solved by inferences. Our equity law, indeed, confesses that it is impossible, precisely, to define what constitutes fraud, or what shall be taken as the evidence of it.[1] The fertility of human invention is too great, and the fraudulent devices and schemes of men too complex and multiform, to be anticipated and provided against by any specific form of proof. Sir William Jones, himself, though stating the law in conformity to the principle established in the civil code, concedes that if the depositary commit even a gross neglect in regard to his own goods, as well as those bailed, by which both are lost or damaged, he cannot be said to have violated good faith; and that in this case, the bailor must impute to his own folly the confidence which he reposed in so improvident and thoughtless a person.[2] The case here presented, assumes that gross neglect is not the equivalent of fraud, but only an evidence of it, which may be overcome and rebutted by such other evidence as repels the presumption of bad faith; since the jury in this case would easily find even the gross negligence shown, consistent with an honest intention in the bailee.

Among the earliest cases reported, elucidating the law of bailment, is that of Bonion, which was in detinue for seals, plate and jewels, and the defendant pleaded "that the plaintiff had bailed to him a chest to be kept, which chest was locked; that the bailor himself took away the key without informing the bailee of the contents; that robbers came in the night,

[1] Chesterfield v. Jansen, 2 Ves., sen., 155.

[2] Jones on Bailm., 47; Story on Bailm., § 19, 20, 21, 22.

broke open the defendant's chamber, and carried off the chest into the fields where they forced the lock and took out the contents; that the defendant was robbed at the same time of his own goods." The reply alleged that "the jewels were delivered in a chest *not locked*, to be restored at the pleasure of the bailor," on which issue was joined.[1] From which, it would seem, the decision turned on the question whether the jewels were delivered in a chest locked, or not. According to Sir Edward Coke, when the jewels were locked up in a chest, the bailee was not, in fact, trusted with them;[2] but the reason given has not been considered satisfactory; the confidence would have been a little more complete and perfect by a delivery of the key, but that clearly cannot be necessary for the purpose of creating a legal trust. A knowledge of the contents of the chest might require a greater degree of care in its keeping, but could not go so far as to bind the bailee to answer for them under the circumstances, since the chest and his own goods were taken at the same time. It is supposed that there must have been some mistake in the report of this case, for it was established at an early period that a general bailee to keep, is not responsible when the goods are stolen without his gross neglect.[3] However, it is very evident that the care demanded of the bailee of a locked chest, containing jewels, would be very much lessened by the fact that he was not made acquainted with its contents. He would not be required to presume that it contained jewels, nor to keep it with the care with which he would guard that kind of property.[4] It is enough if the depositary keep the property as his own; he is not liable for its loss, except by gross neglect. If it be wrested from him by robbery, or taken by theft, or destroyed by fire or violence, without his gross neglect, he is not liable.[5] He is not

[1] Fitz. Abr., Tit. Detinue, 59.

[2] 4 Rep., 84.

[3] Lord Raym., 914.

[4] Jones on Bailm., 38.

[5] Foster v. Essex Bank, 17 Mass. R., 479; Finucane v. Small, 1 Esp. R., 315; Jones on Bailm., 39; 2 Kent's Comm., 562; Main v. West, T. U. P. Charlt., 170; Monteith v. Bissell, Wright, 411.

even liable for its loss by a theft committed by his own servant, or by an embezzlement of the fund committed by the agent he entrusts with its custody. He is not liable for the loss of goods in his possession, caused by a storm, without his fault. But on a deposit or bailment of money, to be kept without recompense, if the bailee without authority attempt to transmit the money to the bailor, at a distant point, by mail or private conveyance, and the money is lost, he is responsible.[1] But this would not be so in respect to money received for the use of another, and transmitted to him by the usual conveyance. If a direction accompanies the deposit, it must be complied with strictly, and any deviation from the instructions given will render the bailee liable. Where funds are deposited with a bank for a special purpose, with notice thereof, the bank cannot refuse to apply them to the object for which they were deposited, even where there is a debt due to it by the depositor.[2]

Although the character of the individual depositary cannot be properly the subject of judicial investigation, cases do sometimes occur in which this seems to be necessary, in which his character in fact affects his liability. A man who knowingly entrusts his diamonds or other valuable property with a person of weak and infirm judgment, or to a child wanting experience and discretion, or to one of dissipated habits or crazy intellect, through whose infirmities, the goods are lost or destroyed, it is fair to presume the depositor intended to take the responsibility of all the chances; and the jury have a right, it is said, to presume that he made his contract with reference to these infirmities. (*The William*, 6 *Rob.*, 316.) Where a gratuitous bailee put his brother's horse into a pasture with his own cattle in the night time, and the horse, through a defect of the fences, fell into a neighboring field and was killed, it was thought he was responsible, because it was a gross negligence to put a horse into a dangerous pasture to which he was unused. (*Rooth v. Wilson*, 1 *B. & Ald.*, 59.) The bailee is sometimes held re-

[1] Stewart v. Frazier, 5 Ala., 114.

[2] Bank of the United States v. Macalister, 9 Barr., 475.

sponsible for the loss of goods bailed with him, notwithstanding he has taken the same care of them as of his own, or rather treated them both with equal neglect. In Tracy v. Wood, where a person had a deposit of money, and put it with his own in a valise on board a steamboat, and left it there in an exposed situation all night, and it was stolen, his own money being left, he was held responsible for gross negligence; but if he had left it for a moment only, under ordinary circumstances, no danger pressing, it would have been otherwise.[1]

Right of Accession.

Under the civil code, fruits of the earth, whether spontaneous or cultivated; civil fruits, that is the revenues yielded by property from the operation of the law, or by agreement; children of slaves and the young of animals, belong to the proprietor by right of accession.[2] The fruits produced by the thing belong to its owner, although they may have been produced by the work and labor of a third person, or from seeds sown by him, on a reimbursement of his expenses; so also that which becomes united to or incorporated with property, belongs to the owner of such property.[3] In like manner, accretions formed successively and imperceptibly to any soil situated on the shore of a river or creek, called alluvion, belong to the owner of the land bounded by the stream.[4] A similar principle prevails with respect to personal property, or things movable, but always with a certain qualification, resting upon principles of natural equity. When two things belonging to different owners, and which have been united in such a manner as to form a whole, are nevertheless of a nature to be separated, so that one may exist without the other, the whole belongs to the owner of the thing which forms the principal part, under the obligation of reimbursing to the other the value of the thing which has been united to his own. That part is considered as principal, to which the other has been united only for the use, ornament or completion of the other. Thus the diamond is the principal thing

[1] 3 Mason R., 12
[2] Code of Louisiana, 491, 493,
[3] Idem, 496.
[4] 6 M., 216, Morgan v. Livingston.

with reference to the gold in which it is set, and the coat with reference to its trimmings.

The rule above stated is varied and qualified where the accession is made unknown to the owner or without his consent. In such case, where it is practicable, the owner may demand that the thing be separated and returned to him, even though some injury has resulted to the thing to which it has been united. If an artificer has employed materials which did not belong to him, in making another article, whether the materials may or may not be brought back to their former shape, the person who was the owner of the materials has the right to claim the thing which was made out of them, on reimbursing the price of the workmanship; not so where the work greatly surpasses the value of the materials employed. Where one person employs materials owned in part by himself and in part by another, in the construction of a new article of property which cannot be easily separated into its constituent parts, the two become proprietors in common of it in proportion to the value of the materials and labor which have entered into its construction. When, however, the materials belonging to one of them are far superior to the others, both in quantity and value, the owner of the most valuable materials may claim the thing resulting from the mixture, on paying to the other the value of his materials. In case the thing remains in common to two owners, it is ordered to be sold at auction for the common benefit.[1] In all these cases where the owner, whose materials have been employed unknown to him, in making a thing of another kind, has the right to claim the property of that thing, he is at liberty to demand either that the materials be returned to him in the same species, quantity, weight, measure and quality, or that their value be paid, with such damages as circumstances may require.[2]

Our law of bailment, agreeing with the essential principles of the civil code, on which that of Louisiana is based, differs from it, in some respects, and totally in its mode of

[1] Code of Louisiana, Art. 512 to 524. [2] Idem, 524.

enforcement. Under the general principles of the common law the increase of a flock belongs to the person, who by hiring for a time, becomes their temporary proprietor.[1] This was not so under the civil code, with reference to the offspring of slaves, who were treated as an exception to the ordinary principle. The action of Merritt v. Johnson, illustrates our law with reference to the acquisition of property by accession.[2] Travis, who was a shipwright, entered into an agreement with Merritt, by which he agreed to build a sloop for him of certain dimensions, Travis agreeing to furnish the timber requisite to complete the frame of the vessel at the shipyard, and to finish and launch her by a given day; the joiner's work was to be done at Merritt's expense, who engaged to pay Travis one-third of a sum named, as soon as one-third of the work was done; one-third as soon as another third of the work was done, and the balance at the completion of the whole. Under this agreement Merritt furnished various materials for the vessel, and advanced money to Travis for the purchase of others. At this stage of the business, Merritt assigned the contract with Travis and his interest in the vessel, then unfinished, to the plaintiff, who continued to furnish materials and advance money on the contract, until about one-third of the vessel was finished, being planked up to the wales; Travis having in the meantime furnished such materials as he was bound by the contract to supply up to that period. At this time the vessel was seized by the sheriff on an execution issued on a judgment against Travis, and sold as the property of Travis, in her unfinished state, to the plaintiff in the execution, who transferred it to the defendant, he being acquainted with all the facts. The vessel was built on premises hired by Travis, and the defendant having refused to deliver up the vessel on a demand made of him, a suit was brought for its recovery by plaintiff; and the court say: "The principal part of the materials for the sloop, such as the timber for the frame, was furnished by Travis, and the sloop was one-third finished and planked

[1] Wood v. Ash, Owen, 138; Putnam v. Wyley, 8 John. Rep., 433.
[2] 7 John. Rep., 473.

up to the wales, when she was seized and sold by the sheriff as the property of Travis, and under that sale the defendant holds the possession. The plaintiff's right rested only on the contract with Travis, and the sloop did not become his property until finished and delivered. The ground on which the sloop stood, did for that occasion, belong to Travis, and as he furnished all the timber for the frame, he certainly contributed the principal part of the materials. There is then no just pretence for considering the property of the unfinished sloop as vested in Merritt. When the materials of another are united to materials of mine, by my labor, or by the labor of another, and mine are the principal materials, and those of the other only accessory, I acquire the right of property in the whole, by right of accession. This is considered as a general principle in the acquisition of property. It is so laid down by Bracton (*de acqui rerum dom*, c. 2, s. 3, 4,) and Pothier illustrates it by a variety of clear and apposite examples (*Traité du droit de proprieté*, *No.* 169, 180,) Malloy (*b.* 2, *c. l. s.* 7,) applies a similar principle to the very case of building a vessel, and he refers to the Pandects, (*Dig.* 6. *l.* 61,) where it is admitted that if one repairs his vessel with another's materials, the property of the vessel remains in him; but if he builds a vessel from the foundation with the materials of another, the vessel belongs to the owner of the materials. Gothofredus, in his notes upon this passage, says, that if one builds a ship with his own and another's materials, the ship is his property, unless the keel was furnished by the other, and then the property would follow the keel, which he considers *instar soli et fundi*. But, without pursuing these distinctions further, it is sufficient to observe, that upon the principles acknowledged by all the writers, the property of the vessel in question was in Travis when she was sold under the execution against him, and judgment must accordingly be rendered for the defendant."

The civil and the common law agree, that where a stranger builds upon the land of another, and the building is attached to the soil by a substantial foundation, the owner

of the land acquires the structure.[1] The same is true of crops sown, or orchards planted, on another's grounds. In respect to a picture painted on another's canvas, the Roman law held that the canvas became accessory to the picture, on account of the excellence of the art. But by a singular inconsistency, it also held that the owner of a parchment on which another had written a poem or history, acquired this literary labor as accessory to his paper or parchment, the parchment being considered the principal, which drew to its owner the title to the poem or history. The French Code, which is based on the civil law, rejects this absurd and unreasonable doctrine, and makes the parchment accessory to the history.[2]

The common law does not allow a trespasser to acquire title to property by converting or altering it into some new form, neither in fact did the civil law, except where it was incapable of being restored to its original shape, nor even then, in all cases; grapes made into wine, in ignorance of their being the property of another, vested in the person converting them into a new species of property. It did not encourage trespassers any more than does the English common law, under which, notwithstanding any alteration of form, property may have undergone in the hands of the trespasser, the owner may seize it in its new shape, if he can prove the identity of the original materials; as if leather be made into shoes, or cloth into a coat, or a tree be squared into timber. This principle is well established by a long course of decisions.[3]

The principle was elaborately and very ably discussed in the case of Salisbury v. McCoon; it came up first in the supreme court, and is reported in 6 *Hill*, 425. After a second trial, the case was again argued in the supreme court, where it was held that the rule that a chattel wrongfully taken and changed by a process of manufacture into a different species of property so as to lose its identity, cannot be retaken by

[1] Fryatt v. The Sullivan Company, 5 Hill R., 116; and same case, 7 Hill R., 529; but see Smith v. Benson, 1 Hill R., 176.

[2] Pothier, Droit de Propriété, n., 169, 192; 2 Kent's Comm., 362.

[3] Betts and Church v. Lee, 5 John. Rep., 348, and the cases there cited.

the former proprietor, does not depend upon the motives of the wrong-doer, but applies as well to the case of a wilful trespass as to a taking by mistake.[1] The corn though wrongfully taken, having been manufactured into whiskey, by which the nature and species of the commodity was entirely changed and its identity destroyed, the property was held to be also changed and vested in the manufacturer, notwithstanding the corn was taken with the knowledge that it belonged to another. But this decision was reversed in the court of appeals[2] where it was adjudged that the property was not changed, the property being taken from the owner by a wilful trespasser and converted by him into whiskey; and it was further held, that a creditor, having an execution against the owner of the corn, might seize the whiskey and sell it to satisfy his debt. It was admitted, however, that if a chattel be converted by an innocent purchaser or holder into a thing of a different species, as wheat into bread, olives into oil, or grapes into wine, the original owner cannot reclaim it. But the wilful wrong-doer can acquire no property in the goods of another by any change wrought in them by his labor or skill, however great the change may be, provided it can be shown that the improved article was made from the original material. There is no difference between the civil and common law in this respect.

There seems to be no want of agreement between the decision of this case and that of the first reported case, as early as the Year Book, 5 H. 7 f. 15; which is thus translated.[3] "A writ of trespass was brought for the taking of certain slippers and boots; and the defendant says that he was possessed of certain *dickers* of leather and bailed them to one J. S., which said J. S. gave them to the plaintiff, and then the plaintiff made from them the slippers and boots, and the defendant came and took them as he lawfully might do, and prayed judgment *si actio*. Then the plaintiff moved the court that this plea was not good; and that the defen-

[1] 4 Denio, 332.
[2] 3 Comst., 379.
[3] Note to the case of Salisbury v. McCoon, 4 Denio, 335.

dant could not take them again, because, by the making of the boots and shoes, the property was so changed as to be of another nature; as if one took barley or grain and made malt of it, he, from whom the grain was taken, could not take the malt, because the thing taken is changed into one of another nature. And so if trees are taken and a house built from them, he from whom the trees are taken, cannot tear down the house to take them again, because other things are joined with them. But if a thing is taken wrongfully, and nothing is joined or mingled with it, nor is it altered to a thing of another nature, the party may take it again. Thus, if one take a tree and square it with an axe, there the party may take it again, because it is not changed to another article, nor is anything mingled or joined with it. But if a man take silver and make of it a piece of money, or take a piece of silver and gild it with gold—in either case the party cannot retake it. So in this case, the leather is mixed with thread; and therefore the party cannot retake it, wherefore it seems the plea is not good.

But the court hold the contrary clearly. And as to the case of grain taken and malt made of it, the party cannot retake it, because the grain cannot be known. And so of pennies or groats, when another piece is made of them, this cannot be taken, because one penny cannot be distinguished from another. So, also, is it if one take a piece and from it make pennies at the mint, the party cannot take the pennies because they cannot be known one from the other. And so of all similar cases. The same is the case in building a house; there the timber is changed, becoming part of the freehold, and for this cause it cannot be taken. But in every case where the thing itself may be known, there the party may take it, notwithstanding that some other thing be joined or mingled with it. So if one take a piece of cloth and make himself a coat, the owner may rightfully retake it, for the reason that it is the same thing, and not different. So also in the case put, if one take a tree and square it with an axe, the party may lawfully retake it, because the tree may be known notwithstanding. The same of iron of which

the smith makes a tool. And so it was held by the whole court."

In like manner it is uniformly held that where a person, having charge of the property of another, so confounds or mixes it with his own that it cannot be distinguished, he must bear all the inconvenience of the confusion; if he cannot distinguish and separate his own, he will lose it; and if damages are given to the plaintiff for the loss of his property in that way, the utmost value will be taken.[1] The person creating the confusion by wrongfully mixing his own property with that of another, loses it. Where, however, the things mixed are of the same kind and quality, as grain of equal value, each party is permitted to measure out his proportion of the amount, the injured party taking first his given quantity.[2] "If," says Mr. Justice Blackstone, "the intermixture be by consent, I apprehend that in both cases, (by the civil and common law) the proprietors have an interest in common, in proportion to their respective shares. But if one wilfully intermixes his money, corn or hay, with that of another man, without his approbation or knowledge- or casts gold, in like manner into another's melting-pot or crucible, the civil law, though it gave the sole property to him who has not interposed in the mixture, yet allows a satisfaction to the other for what he has so improvidently lost. But our law, to guard against fraud, gives the entire property, without any account, to him whose original dominion is invaded and endeavored to be rendered uncertain, without his consent."[3]

In the case of Lupton v. White, Lord Eldon held that an agent or bailiff, confounding his principal's property with his own, must be charged with the whole, except what he can prove to be his own. If a man having undertaken to keep the property of another distinct, mixes it with his own, the whole must, both at law and in equity, be taken to be the property of the other until the former puts the subject under

[1] Hart v. Ten Eyck, 2 John. Ch. Rep., 62.
[2] 15 Ves., 442; Popham's Rep., 38, pl. 2.
[3] 2 Black. Com., 405.

such circumstances that it may be distinguished as satisfactorily as it might have been before that unauthorized mixture upon his part.[1] Where money was so mixed by an agent with his own, and the securities so changed as to be no longer distinguishable, it was adjudged that the person or agent by whom the confusion had been created, must suffer the loss incurred; that if he could not distinguish what was his own, the whole must be considered as belonging to the other.[2] There is in such cases always some violation of the trust on which the property was received. An inadvertant mixture of goods without fault of the bailee works no change of title. It is the wrongful mixture or confusion of goods, which cannot be distinguished or separated, that changes or passes the title to the party whose rights or property has been invaded.

The principle is one of convenience and equity, and has a general application. If the goods of a stranger are in the possession of a debtor, and so mixed with the debtor's goods that the officer on due inquiry cannot distinguish them, the owner can maintain no action against the officer for taking them, until notice and a demand of his goods and a refusal or a delay to redeliver them.[3] A mixture of goods of the same kind and quality, such as wheat owned by different persons, which can be separated by measure, creates no difficulty in the division of the property; and hence no change of title takes place. Most of the cases involving a confusion of goods, so as to leave them inseparable or undistinguishable, have arisen in equity; and the property of the party causing the intermixture has been held to pass only where the confusion or mixture has been created through his fault; and then only where there remained no means of separating or distinguishing the goods.[4]

[1] 15 Ves., 432.
[2] Panton v. Panton, cited in Lupton v. White, 15 Ves., 432.
[3] Bond v. Ward, 7 Mass., 123.
[4] 2 Kent's Comm., 365; Story on Bailm., § 40.

A Second Bailment.

The person who has property on deposit, so as to render him liable as a bailee, may enter into a contract of bailment with a third person to whom he may deliver the goods for safe keeping.[1] But such a contract will not prevent the owner of the goods from following them; he can even in some instances, maintain trespass against the person who siezes them in the hands of his bailee, who has no interest or claim to hold the goods coupled with his possession. The rule of law applies here, that the general property draws after it the possession.[2] Not so where the bailee has a special property in the goods as against the owner of them, such as the lien which the master of a vessel has on the cargo for freight. In this case, the delivery of the goods for safe keeping by the master who has a lien on them, is not such a parting with the possession as destroys the lien. Generally, the possession of the mere naked bailee is held in law to be the possession of the depositor; the undertaking of the depositary being gratuitous, may be determined on demand. And where the bailee desires to free himself from the responsibility incident to the contract, he may without doubt do so on his own motion, by restoring the goods to the owner or depositor. Not having stipulated to keep them for any particular length of time, he cannot be compelled to continue an undertaking wholly gratuitous on his part. Neither can he, no time for the redelivery of the bailed goods having been agreed upon, be subjected to an action or suit at law without a previous demand having been made upon him for the goods, and a refusal on his part to restore them.[3]

Redelivery.

The rule is that the depositary is bound to redeliver or restore the chattels bailed to the bailor; and the bailor may

[1] Armory v. Delamirie, 1 Str. Rep., 505.
[2] Thorp v. Burling, 11 John. Rep., 286.
[3] Brown v. Cook, 9 John. Rep., 361; 2 Kent's Comm., 567.

recover the goods of his bailee without proving his right of property in them; until the goods are seized by the right owner or by some superior title, the depositary is compelled to restore the goods to the person from whom he received them, whose right he cannot controvert.[1] But if he deliver them to the rightful owner, on demand, he has a good defence against the bailor, since a delivery in such a case is not a matter of choice.[2]

To avoid the inconvenience of a double litigation, where there are rival claimants to the property, and an action is brought against the bailee for its detention, the law, in some cases, permits the adverse claimant to be brought into the suit by the process of *garnishment*.[3] But a much more convenient remedy is furnished in courts of equity by a bill of interpleader, which may be filed where the plaintiff stands in the situation of an innocent stakeholder, against defendants claiming of him the property, fund or duty, by different or separate interests; the object being to protect the complainant against a double litigation, involving also the danger of a double recovery against him. The bill lies only where the complainant is in possession, and claims no interest in the property in dispute.[4] Its accepted definition is: "A bill exhibited, when two or more persons claim the same debt or duty from the complainant, by different or separate interests; and he not knowing to which of the complainants he ought of right, to pay or render it, fears that he may be damaged by the defendants (as by paying his money to a wrong hand), and therefore exhibits his bill of interpleader against them, praying that the court may judge between them, to whom the thing belongs, and that he may be indemnified. It claims no right in opposition to those claimed by the persons against whom the bill is exhibited, but only prays the decree of the court, to decide between the rights of those persons for the safety of the complainant."[5] Mr. Justice Sutherland, in Atkinson

[1] Roll. Abr., 607; 1 Bac. Ab., 369.
[2] King v. Richards, 6 Wharton, 418.
[3] 2 Kent's Comm., 568.
[4] 2 Barb. Ch. Prac., 118; Atkinson v. Manks, 1 Cowen, 691.
[5] Cooper's Equity Plead., 456; Harrison Ch. Pr., 96; Mad. Ch., 172, 3.

v. Manks, says, the nature of the allegations, therefore, in every bill of interpleader, are: 1. That two or more persons have preferred a claim against the complainant; 2. That they claim the same thing; 3. That the complainant has no beneficial interest in the thing claimed; and 4. That he cannot determine, without hazard to himself, to which of the defendants the thing of right belongs.[1]

It is not necessary that an action or actions should have been commenced in order to give the right to file this bill,[2] nor that the claims should be both of an equitable nature; one may be an equitable and the other a legal claim. But the bill cannot be filed where the plaintiff stands in the relation of a wrong-doer towards either of the claimants, nor where one of them has a clear right to the exclusion of the other.[3] To sustain the bill, there must also be some sort of privity between all the parties, of estate, title or contract. Parties claiming in absolutely adverse rights, not founded in any privity of title, or on any common contract, cannot be compelled to interplead.[4]

Chattels deposited by several joint owners, must be redelivered on the joint demand of the persons making the deposit. Sir William Jones mentions an instance in which this principle was applied in practice at Athens, with the remark that the doctrine was good at Rome as well as at Athens, when the thing deposited, was in its nature incapable of partition.[5] The civil and common law do not differ in this respect; the thing deposited must be restored to the joint owners or proprietors making the deposit. But if the bailee accepts the property from one of them, by whom as well as by the bailee it is treated as belonging to him exclusively, he will be protected by a redelivery of the property to him who bailed it.[6]

[1] 1 Cowen, 703.

[2] Richards v. Salter, 6 John. Ch. R., 445.

[3] Mohawk and Hudson Railroad Co. v. Clute, 4 Paige, 384; Shaw v. Coster, 8 Paige, 339.

[4] Cooper Eq. Pl., 48; Story's Eq. Pl., 239.

[5] Jones on Bailm., 51.

[6] May v. Harvey, 13 East., 197.

The civil and common law approximate each other so nearly in respect to the obligations of the depositary relative to his duty to redeliver the subject of bailment, that it may be proper to mention briefly the provisions of the Code of Louisiana, which is in substance the civil law. The depositary by this Code must restore the thing deposited only to him who delivered it, or in whose name the deposit was made, or who was pointed out to receive it. He cannot require him who made the deposit, to prove that he was the owner of the thing. Yet if he discovers that the thing was stolen, and who the owner of it is, he must give him notice of the deposit, requiring him to claim within due time. If the owner, having received due notice, neglects to claim the deposit, the depositary is fully exonerated on returning it to the person from whom he received it. If the person who made the deposit be deceased, the thing deposited can be restored only to his heir; if there be several heirs, it must be delivered to each of them for his respective part and portion, unless the thing deposited be indivisible, in which case they must agree among themselves.

If the depositor has changed condition, as if a woman marries, or a person of full age falls under interdiction, the deposit can be restored only to the person who has the administration of the rights and property of the depositor. Where the deposit has been made by a tutor, a husband, or by any other administrator, it can be restored, after the function of that administrator has ceased, only to him whom he represented. When the contract specifies a place where the deposit is to be restored, it must be delivered at that place, but the expense of conveyance to the place of delivery must be borne by the depositor. If the contract does not specify the place where the deposit must be restored, it is to be restored at the place where such deposit has been made; and it must be restored as soon as it is demanded, even though the time for its restoration stipulated for has not arrived. The depositary is not allowed to retain the goods deposited on any pretence of a debt due him from the de-

positor, by way of offset, but he may retain it for any advances made arising from the deposit.[1]

If the bailee refuse to deliver goods on demand made by the depositor, or does any act by which he acknowledges to hold them for a third person, he is responsible for a conversion of the property, and after having done so, the agent placing his refusal upon the absence of his principal, the bailee cannot claim to hold on the ground of lien for storages and charges paid. So, if he receives them for a particular purpose and transfer them in contravention of that purpose, even though it be to a bona fide purchaser, without notice, the latter cannot resist the claim of the owner.[2] So closely is the depositary held to the execution of the terms of his contract, that it has been asserted that where goods are delivered to a bailee, to be delivered over to another, and afterwards an action is brought by a person having a right to the goods, the defendant may, pending the action, deliver over the property to the person to whom it was deliverable, and thereby discharge himself.[3] But the bailor, in cases of naked bailment, has the right to countermand his bailment; and after that, the delivery by the bailee will not be good. This right of countermand arises out of the gratuitous nature of the contract. Where the bailee has delivered the goods to a second bailee, he has the right to demand and recover them; and the original bailor has the same right of recovery from either bailee, because he has the property, and both are bound to answer him.[4] And it was formerly held, that where the second bailee delivers the goods to the original bailor, it would be no bar to a suit by the first bailee against him. But this doctrine is now entirely exploded by the recent authorities.[5]

After a legal demand has been made by the bailor, the bailee must answer for any loss or casualty that may happen

[1] Code of Louisiana, Art. 2920 to 2927.

[2] Holbrook v. Wight, 24 Wend., 169; Wilkinson v. King, 2 Camp. N. P. C., 335; 2 Stark. N. P. C., 311.

[3] Bac. Abr. Bailm., D.

[4] Isaac v. Clark, 2 Bulst., 306, 312.

[5] Agle v. Atkinson, 5 Taunt., 759; Whittier v. Smith, 11 Mass. R., 211.

to the goods; unless, perhaps, in cases where it may be strongly presumed that the same accident would have befallen the thing bailed, even if it had been restored at the proper time. At common law, the general rule is that a refusal to deliver on demand, or at the time and place stipulated, will be received as evidence of a conversion of the property, which will render the bailee liable for its value.[1] Whatever acts amount to a conversion of the property, or a denial of the bailor's rights over it, renders the bailee from that time absolutely responsible for it, and casts upon him all the risks that may afterwards attend the property.[2] Of course, a sale or misuse of the goods bailed will render the bailee liable for them; by selling them he makes himself guilty of a breach of faith, which renders him liable for their full value; by any misuse of the goods, equivalent to a denial of the owner or depositor's rights in them, the bailee makes himself responsible for the property.

As against the true owner, the bailee holding property on deposit gratuitously, does not stand in any better condition than the bailor; since the true owner may follow and take the property in whose hands soever it may be found. Against every other person, the general principle is, that actual and lawful possession gives a right of action to the person holding personal property, for its protection.[3] It was formerly considered that the plaintiff in such cases must show a special property in the goods claimed, in order to maintain the action[4]; but that doctrine has been recently so far modified as to give the bailee, or person in possession, a right of action against all persons who wrongfully interfere with the goods.

Wherever goods or chattels pass into the hands of the bailee under a written contract, by the terms of which they

[1] Brown v. Hotchkiss, 9 John. R., 361; May v. Harvey, 13 East., 197.

[2] Sargent v. Gile, 8 New Hamp. Rep., 325.

[3] Armory v. Delamire, 1 Str., 504; Fisher v. Cobb, 6 Vermont R., 622; Sutton v. Buck, 2. Taunt. R., 302; Miller v. Adsit, 16 Wend., 335; 5 Taunt., 579; White v. Webb, 15 Conn. R., 302.

[4] Templane v. Case, 10 Mod. R., 25; 5 Mass. R., 304; Hoyt v. Gelston, 13 John. R., 151 and 14 do., 131.

are deliverable on demand at a particular place, the bailor cannot recover them until they have been properly demanded according to the contract; neither can he require their delivery at any other place than that specified. If no place is specified for their delivery, they are deliverable at the place of deposit, and the bailee cannot be required to produce them at any other place, unless he has voluntarily stipulated to do so.[1] As in other cases, the contract regulates the place and mode of the redelivery, and the time or event on the occurrence of which it is to be made.

Right to use.

How far the bailee's right to use the goods or chattels deposited with him goes, depends upon the circumstances of the case. If the property is bailed with the evident intention that it shall be used, its use will not impose upon the bailee any additional obligation.[2] It is laid down as a general rule, that the depositary has no right to use the thing deposited, except in those cases where its use may be necessary for the preservation of the deposit, or where the consent of the depositor may be reasonably presumed. If he use the thing deposited, in cases where no such consent can be inferred, the bailee is answerable for all casualties.[3] There are many instances in which this consent to the use of the subject of bailment will be presumed. The civil and common law agree, that the depositary cannot make use of the thing deposited, without the express or implied permission of the depositor.[4] The bailee, it should seem, may use moderately a horse left in his custody; may milk a cow left in his possession, or use the books of a friend deposited in his library; such use is not injurious to the property, and is sometimes very useful for its preservation.[5] If the bailee derive profit or advantage from such use of the property

[1] Brown v. Cook, 9 John. R., 361.

[2] De Fonclear v. Shottenkirk, 3 John. R., 170.

[3] 1 Cowen's Trea., 71, 3d ed.

[4] Code of Louisiana, art. 2911; Bac. Abr. Bailm. D., 2 Kent's Comm., 568.

[5] Story on Bailm., § 89; Jones on Bailm., 81.

deposited with him, he is at least under the civil law, answerable for the value of such use; the effect of such use must, therefore, operate to change the nature of the contract into a bailment for hire, thus enhancing the degree of care and diligence required of the bailee.

The naked depositary ought neither to be injured nor benefitted in any respect by the trust undertaken by him; if he is at some expense in keeping the property deposited with him, he may, without doubt, make use of it in a reasonable manner by way of compensation for the charge. So long as the use he makes of the deposit is less in value than the expenses incident to its custody, the liability of the bailee is not increased by such use, since he in fact acquires no advantage from it. It is otherwise where the thing deposited is of such a nature that it imposes no charge upon the depositary in the keeping of it; as in the case of a deposit of jewelry; if the bailee wear them, he will be liable for their loss.[1]

The person making a deposit must reimburse the depositary the money he has advanced for the safe keeping of the thing, and indemnify him for all the deposit has cost him. He must also indemnify the depositary for the losses which the thing deposited may have occasioned him;[2] this is the rule of the civil law, and it should seem to be equally good at common law. Under the civil law such advances or losses became a lien upon the chattels in deposit, but at common law no lien attaches for such a demand;[3] it is, it would appear, only a right of action, though it would doubtless be more equitable to allow a lien in such cases. If the bailee come into the possession of the property by finding, and the owner offers a reward for the restoration of it to him, the reward becomes a lien on the property.[4]

[1] Jones on Bailm., 81.

[2] Code of Louisiana, art. 2931; Jones on Bailm., 47.

[3] Story on Bailm., § 121; Nicholson v. Chapman, 2 H. Black. R., 254; Amory v. Flyn, 10 John., 103.

[4] Wentworth v. Day, 3 Mitc. R., 325.

A deposit of articles shut up in a box, or under a sealed cover, should not be examined by the depositary, since he should not seek to know what the depositor has concealed from him.[1] If the things deposited be locked up in a box or chest, or enclosed in a wrapper under seal, this circumstance would imply that they are not to be used; books, jewelry, plate or pictures deposited in this manner should be retained carefully in the condition in which they are received.[2] So also if the goods are of such a character as to be impaired by usage, they must not be used; since it cannot be presumed that the owner intended to place them at the disposal of the depositary for his own advantage. The presumption would be different with respect to such things as would be very little if at all injured by use, as books left with a friend neither boxed nor locked up, in the use of which even moderate care would prevent them from being injured.[3] Still the general doctrine seems to be that the depositary, who uses the thing bailed with him, is responsible if it be lost or injured while it is so used; the use so far affects the contract as to make it partake of the nature of a loan, and thus casts upon the depositary the increased responsibility of the borrower, who must answer for any accident which a very careful and vigilant man could have avoided. If the use be without either the express or implied consent of the depositor, the law is that the depositary is liable in any event of loss or damage; he becomes thereby guilty of such a violation of his contract or trust that he must answer for any and every mischance. Such an unauthorized use of the goods for his own convenience, by which they are exposed to the dangers of injury and loss, justly imposes on the bailee the duty of answering for them in any event.[4]

The bailee has no right to pledge goods deposited with him for an advance of money; that is an use of the property not authorized by law, in direct violation of his contract. The owner in such a case may follow and recover the

[1] Code of Louisiana, art. 2914.
[2] Story on Bailments, § 90.
[3] Jones on Bailment, 81; Ld. Raym., 917.
[4] 3 Atk. R., 44.

property in whose hands soever it may be found. The action of trover lies against the person in possession, who refuses to deliver up the goods,[1] and thereby converts them to his own use. The transfer to him being wrongful, he acquires no greater right over the property then was possessed by the original bailee. Whatever special property the bailee acquires in the goods, his right and control over them are limited by the terms of the contract under which he has them in custody. He has, it should seem, only a possessory interest in them,[2] and strictly speaking no right of property. The law gives him an interest sufficient to carry out and accomplish the purposes of the contract,[3] which extends to the defence of the property by action against any and all persons who may interfere with it, but does not include the right to bestow it or make use of it in any way not evidently contemplated by the parties to the contract of bailment.

Goods in the possession of one who has only the custody of them for the time being, as where they are in the keeping of the owner's servant, and he delivers them for safe keeping into the hands of a depositary, must be redelivered to the owner on demand. Until a demand is made or notice given, the depositary will be protected in the act of restoring the goods to the person from whom he received them; this at least is the principle of the civil law,[4] under which the bailee if he discover that the goods were stolen, or who the true owner of them is, must give notice to him of the deposit, requiring him to make his claim in due time. If this is not done, he is at liberty to restore the goods to the bailor. At common law the owner of stolen property may follow it and retake it in whose hands soever it may be found.[5] Though possession of personal property is *prima facia* evidence of title, it may be overcome by positive testimony; and since on every sale of personal chattels there is an implied warranty of the title to them, the remedy of the

[1] 3 Atk. R., 44, Hartop v. Hoare; 5 Mass. R., 303, Waterman v. Robinson.
[2] Commonwealth v. Morse, 14 Mass. R., 217.
[3] Giles v. Grover, 6 Bligh R., 277; Story on bailment, § 93.
[4] Code of Louisiana, art. 2921. [5] Cowen's Trea., 3d ed., 329.

innocent purchaser of stolen property is by an action against the vendor. The title of the owner cannot be divested by the action of third persons without his concurrence or such neglect on his part as induces the purchaser to part with value for the same. An exception to this general rule exists in England, in respect to sales made in market overt; but the exception is not recognized in this state.[1]

Even an auctioneer who sells stolen goods is liable to the owner in an action of trover, notwithstanding the goods are sold and the proceeds paid over to the thief without notice of the felony.[2] The exception in England, just mentioned, founded on a custom which prevailed principally in the city of London, has always been regarded and restricted by the courts, with unusual jealousy and vigilance.[3] In the origin of the custom sales in fairs or markets overt were regulated with great strictness, so as to give to them the utmost publicity and surround them with every circumstance of openness and fair dealing.[4] As we have in this state no such market, sales here have no other effect than mere private sales in England.[5]

The rule is different where property has been acquired by a fraudulent purchase, which, though void as between the parties, confers upon the vendee the possession of the property and thereby enables him to dispose of it to a bona fide purchaser for value. In this case the purchaser in good faith holds by a title superior to that of the original owner; since by parting with the possession he has armed the fraudulent vendee with the evidence of title, and thus enabled him to appear as the owner in a sale of the property.[6] He has made a delivery with an intent to pass the title, and after that he is not permitted to follow and retake the goods from the hands of an innocent purchaser, or pledgee who has made advances upon them in good faith.[7]

[1] Hoffman v. Carow, 20 Wend. R., 21.
[2] 20 Wend., 21.
[3] Wheelwright v. Depeyster, 1 John. R., 480.
[4] 2 Black. Comm., 449, 450.
[5] Mowrey v. Walsh, 8 Cowen R., 238.
[6] Andrew v. Dieterick, 14 Wend. R., 31.
[7] 14 Wend. R., 31; 8 Cowen R., 238; Root v. French, 13 Wend. R., 570.

CHAPTER III.

GRATUITOUS COMMISSIONS OR MANDATES.

Nature of the Contract.

THE difference between a contract of bailment by deposit without reward, and that species of contract known in the civil law as *Mandatum*, is not very broad, and does not so much concern the nature of the contract as the mode of its performance. A mandate is a bailment of goods without reward, to be carried from place to place, or to have some act performed about them.[1] The leading case of Coggs v. Bernard, decides, that where a man undertakes to carry goods safely and securely, he is responsible for any damage they may sustain in the carriage through his neglect, though he was not a common carrier and was to have nothing for the carriage. An executory contract of this kind cannot be enforced since it wants a consideration to support it; it is an agreement to perform an act in the future, without any compensation promised or received, and it cannot be enforced in an action. If, however, the contractor actually enter upon the performance of the work contracted to be done, he is bound to perform it in a careful and workmanlike manner, and is responsible for neglect. A negligent performance of the undertaking by which the property is injured creates a liability for the loss occasioned. The owner's trusting the bailee with the goods, is held a sufficient consideration to oblige him to a careful management.

Where a person received a sealed letter, containing a one hundred dollar bank bill, at New Orleans, and engaged to

[1] 2 Ld. Raymd., 909–913; Jones on Bailm., 53; 2 Kent's Comm., 569. In the the case of a mandate, the labor and services are the principal objects of the parties, and the thing is merely accessorial.

deliver it to the individual to whom it was addressed at Salina, in this state, whose property he was informed it was, it was adjudged that an action could not be sustained against the bailee for money had and received, without showing that he broke the seal of the letter and appropriated the money to his own use. Being a bailee without hire, he is liable for gross neglect only, which must be established by evidence. But it seems that a demand of the package made upon him and his refusal to deliver it, will cast upon him the burden of showing that the property was lost without fault on his part, that is, without gross negligence.[1] Neither lapse of time nor failure to deliver the package will operate to compel him to show by what means it was lost. But if, when called upon to deliver it, he refuses, without showing any good reason why he does not, the presumption is against him and he must then account for the loss.

Under this contract of mandate, by which one undertakes without recompense to do some act for another in respect to the thing bailed, the owner of the property is termed the mandator and the active agent in the transaction is called the mandatary. These terms are used for both convenience and accuracy in this uniform sense. The mandate is the commission or authority under which the bailee acts, in the execution of the business committed to him.[2]

The Subject of the Contract.

The subject matter of the contract of mandate, as in the contract of bailment by deposit, must be personal property, the custody of which is, for the time being, given into the hands of the mandatary.[3] In the civil law, the contract might arise in respect to real property, as well as in cases where no property at all was concerned. What we term an agency, or a contract to perform certain specific work, was termed mandate in the civil law; and the contract in-

[1] Beardsley v. Richardson, 11 Wend., 25.
[2] Jones on Bailm., 62, 63.
[3] Story on Bailm., § 144, 145.

cluded a great variety of undertakings with respect to property, the custody of which was not transferred. A gratuitous agency constituted the contract, as to purchase a given piece of property, or to perform a particular piece of work. The obligations involved, were similar to those imposed by our law under the same circumstances, but the classification is different.

The Code of Louisiana makes the contract of mandate to arise in five different manners: for the interest of the person granting it alone; for the joint interest of both parties; for the interest of a third person; for the interest of such third persons and that of the party granting it; and finally for the interest of the mandatary and a third person. It is in form and effect a commission given by the mandator to another to transact for him and in his name, one or several affairs. The object of the mandate must be lawful, and such as the mandator has the right to accomplish, and the contract is completed only by the acceptance of the mandatary.[1] Unless a compensation is agreed upon, the services are presumed to have been rendered gratuitously. In fact, the services are generally compensated under the Code of Louisiana, as is manifest from the great variety and matters of agency comprehended under this contract. In general, whatever may be committed to another by a procuration or power of attorney, is there embraced under the contract of mandate, sometimes in general terms to include all affairs, and again limited to one affair alone.

In respect to the performance of this contract, the mandatary is responsible not only for unfaithfulness in his management, but also for his fault or neglect. But his responsibility with respect to faults is enforced less rigorously against the mandatary acting gratuitously, than against him who receives a reward.[2] A broker is by the same law classed as a mandatary, who is employed to negotiate a matter between two parties, and is for that reason regarded as the mandatary of both,[3] to whom he owes the same fidelity.

[1] Code of Louisiana, art. 2954, 2955, 6, 7. [2] Idem 2985.
[3] Idem 2972.

His obligations and duties do not seem to differ very greatly from those imposed upon brokers and auctioneers under the common law.[1]

The compass of this contract under the civil law, it is evident from what has been said, embraces a much wider range of subjects and relations than are incident to the contract of mandate at common law. We have appropriated from that code only a single class of principles, applicable to duties in respect to which our law was silent. We borrowed only such as we had need of, making them ours from time to time as an occasion arose, in the same manner as we have incorporated much of the civil law into our equity jurisprudence.

Feasance and Non-feasance, consideration.

The main distinction, says Sir William Jones, between one sort of mandate and a deposit, is, that the former lies in feasance, and the latter simply in custody: Whence a difference often arises between the degrees of care demanded in the one contract and in the other; for the mandatary being considered as having engaged himself to use a degree of diligence and attention adequate to the performance of his undertaking, the omission of such diligence may be according to the nature of the business, either ordinary or slight neglect; although a bailee of this species ought regularly to be answerable only for a violation of good faith. This is the common doctrine taken from the law of Ulpian; but there seems in reality to be no exception in the present case from the general rule; for since good faith itself obliges every man to perform his actual engagements, it of course obliges the mandatary to exert himself in proportion to the exigence of the affair in hand, and neither to *do* any thing, how minute soever, by which his employer may sustain damages, nor omit anything, however inconsiderable which the nature of the act requires;[2] nor will a want of ability to perform the contract be any defence for the contracting party; for though

[1] Code of Louisiana, art. 2986, 7, 8.

[2] Lord Raym., 910.

the law exacts no impossible things, yet it justly requires that every man should know his own strength before he undertakes to do an act,[1] and that if he delude another by false pretensions to skill, he shall be responsible for any injury that may be occasioned by such delusion.

The mandatary, as well as the depositary, may by a special agreement render himself responsible even for casualties; but he cannot free himself from responsibility, by any stipulation he can enter into, for fraud or gross neglect. The law does not sanction a contract of that nature.

The distinction taken at an early day between *non*-feasance and *mis*feasance by a mandatary, or a *conductor operis*, is founded in the principle, that though a person cannot be compelled to enter gratuitously upon the business of another, yet when he once takes it upon himself by beginning the work, he becomes responsible for any damages that may arise through his negligence or want of care. Strictly speaking, a *non*-feasance is simply *not doing* what by legal obligation, or duty or contract one is bound to do; and a *mis*feasance is the performance in an improper manner of some act which it was his duty, by contract or otherwise, to have done, or of same act which he had a right to do. On a promise made without any consideration moving to the promisor, an action for non-feasance cannot be maintained.[2] Thus where A and B were joint owners of a vessel, and A voluntarily undertook to get the vessel insured, but neglected so to do, and the vessel was lost, it was held that no action would lie against A for the non-performance of his promise, though B sustained a damage by the non-feasance, there being no consideration for the promise; but a factor or commercial agent, who is entitled to a commission, will be answerable for not executing an order to insure.

Sir William Jones expresses the opinion that an action will lie for damage occasioned by the non-performance of a

[1] Jones on Bailm., 53.

[2] Thorne v. Deas, 4 John. R., 84. In this case, Kent, Ch. J., reviews the leading cases on the subject, from the earliest decisions, showing that a gratuitous promise creates in law but an imperfect obligation.

promise to become a mandatary, though the promise be purely gratuitous.[1] This, however, is clearly not the rule of the common law. Mr. Chief Justice Kent, reviewing the decisions on this point, in the case of Thorne v. Deas,[2] shows clearly, that, by the common law, a mandatary, or one who undertakes to do an act for another, without reward, is not answerable for omitting to do the act, and is only responsible when he attempts to do it and does it amiss. In other words he is responsible for a misfeasance, but not for a non-feasance, even though special damages are averred. The doctrine of the civil law is different in this respect, holding that the promise is obligatory and capable of being enforced legally, on the ground that good faith ought to be observed, because the employer, placing reliance upon that good faith in the mandatary, was thereby prevented from doing the act himself or employing another to do it.

The earliest case at common law, on this subject, is that of Watson v. Brinth,[3] in which the defendant promised to repair certain houses of the plaintiff, and had neglected to do it, to his damage. The plaintiff was nonsuited because he had shown no covenant; and *Brincheley* said that if the plaintiff had counted that the thing had been commenced, and afterwards by negligence nothing done, it had been otherwise. Here the court at once took the distinction between non-feasance and misfeasance. No consideration was stated, and the court required a covenant to bind the party.

In the next case[4] an action was brought against a carpenter, stating that he had undertaken to build a house for the plaintiff, within a certain time, and had not done it. The plaintiff was also nonsuited, because the undertaking was not binding without a specialty; but, says the case, if he had undertaken to build the house, and had done it illy, or negligently, an action would have lain without deed. In short, the whole current of English decisions on this point are

[1] Jones on Bailm., 56.

[2] 4 John. R., 85.

[3] Year Book, 2 Henry IV., 3, b. There is no valid contract where there is no legal consideration.

[4] 11 Henry IV., 33, a.

shown to support this principle, that an action for non-feasance cannot be maintained on a gratuitous promise.[1] The doctrine on the subject, as stated by Sir William Jones in his *Essay on Bailments*, though true in reference to the civil law, is totally unfounded in respect to the English law, which demands a consideration for the support of every contract, such as a compensation either promised or received, or an entry upon the negotiation or business which is the subject of the contract. At common law, though a person may be deceived by a gratuitous promise, it is not an injury for which an action may be maintained. The non-performance of such a promise produces no legal injury, since the party making it may refuse to perform the promise. In effect, there is no legal obligation violated by the non-performance of such a promise, as there can be no legal obligation where there is no consideration.

This principle runs through the entire system of the common law, which holds that a contract or promise without a consideration, is a *nudum pactum*, and void.[2] It is true, that where a person voluntarily undertakes to do a thing for another, and does it negligently or unskillfully, he shall be answerable for the damages arising from his misfeasance. Here the inception of the performance is essential to support the action,[3] as where one voluntarily undertakes to get a policy of insurance for another, and does it so negligently that the policy is of no benefit to the person, the promise in this case is rendered valid and obligatory by the fact of actually entering upon the business. But where an action was brought against a carpenter, retained to repair a house, for the non-performance of his undertaking, in consequence of which the house was damaged, it was held that he was not liable.[4] In this case Lord Kenyon, delivering the opinion

[1] Cases cited on argument, and in the opinion delivered in Thorne v. Deas, 4 John. R., 85; Elsee v. Gatward, 5 T. R., 143; Smeades v. Utica Bank, 3 Cowen R., 662; 20 John. R., 372.

[2] 2 Black. Comm., 445; 1 Comyn on Contracts, 8, 9, 10.

[3] 1 Esp. Cas., 75.

[4] Elsee v. Gatward, 5 Term Rep., 143. The form of the action does not alter the law; for if assumpsit will not lie, there is no technical reasoning that will support an action as for a tort.

of the court, says: "no consideration results from the defendant's situation as a carpenter, nor from the undertaking; nor is he bound to perform all the work that is tendered to him; and therefore the amount of it is this, that the defendant has merely told a falsehood, and has not performed his promise; but for this non-performance of it, no action can be supported." This distinction between non-feasance and misfeasance is recognized in the leading case of Coggs v. Barnard, where the action was maintained on the ground of the negligence by which the work was done, and the injury produced.[1]

It throws some light upon the cases cited from the Year Books, and commented upon by Sir William Jones in his essay, to bear in mind the history of the action of *assumpsit*, which is said to have been first introduced into the law in the reign of Henry IV. Prior to that time, the only remedies for a breach of contract were by an action of *covenant* or *debt*, and it was a settled rule that an action of covenant could be grounded only on a specialty; and debt would only lie for a sum certain, stipulated to be paid, or on a specialty; so that for the non-performance of a parol promise, the party was compelled to apply to a court of equity, which could not award any damages for the non-performance of an agreement.[2] Under this state of things some actions were decided, or thrown out of court, on questions of jurisdiction and form, wthout involving the question whether a gratuitous promise can be enforced or not. The manner in which these cases are reported gave rise to the misapprehension which runs through that part of Sir William Jones' essay embracing the contract of Mandate; in respect to which, Mr. Justice Kent does not hesitate to say that it appears to have been hastily and loosely written; that it does not discriminate well between the cases, is not very profound in research, and destitute of true legal precision.[3]

[1] 2 Ld. Raym., 909–919.

[2] 3 Reeves's Hist. of Eng. Law, 244 to 246, 394 to 396; 2 Comyn on Contracts, 549 – 554.

[3] 4 John. Rep., 100.

Care and diligence required.

The case put by this author in respect to the diamond ring, illustrates the principle which fixes the degree of care demanded of the mandatary; for instance, if Stephen desire Phillip to carry a diamond ring from Bristol to a person in London, and he put it with bank notes of his own into a letter case, out of which it is stolen at an inn, or seized by a robber on the road, Phillip shall not be answerable for it; although a *very* careful, or perhaps a commonly prudent man would have kept it in his purse at the inn, and have concealed it somewhere in the carriage; but if he were to secrete his own notes with peculiar vigilance, and either leave the diamond in an open room, or wear it on his finger in the chase, he would be bound, in case of a loss by stealth or robbery, to restore the value of it to Stephen.[1] In general, the fact that the party did the work on the subject of the bailment with the same care that he did the work on like goods of his own, will repel the imputation of negligence.[2] This presumption may, without doubt, be overcome by proof of actual negligence, or of conduct, which though applied to his own goods, would be deemed negligent in a bailee without hire, of ordinary prudence.[3] Negligence is a fact to be found from the evidence and circumstances.

How far the mandatary may be rendered liable for the want of proper care, even where he shows the same neglect of his own goods, is very well shown in the action of Tracy v. Wood.[4] A undertook gratuitously to carry two parcels of doubloons for B, from New-York to Boston, in a steamboat, by the way of Providence. A in the evening (the boat being to sail early in the morning,) put both bags of doubloons, one being within the other, into his valise with money of his own, and carried it on board of the steamboat and put it into a berth in an open cabin, although notice was given to him by the steward, that they would be safer

[1] Jones on Bailm., 63.

[2] Lane v. Cotton, 1 Ld. Raym., 646; Kettle v. Bromsale, Willes' R., 121.

[3] Rooth v. Wilson, 1 B. and Ald., 59.

[4] 3 Mason R., 132.

in the bar-room of the boat. A went away in the evening, and returned late, and slept in another cabin, leaving his valise where he had put it. The next morning, just as the boat was leaving the wharf, he discovered, on opening his valise, that one bag was gone, and he gave an immediate alarm and ran from the cabin, leaving the valise open there with the remaining bag, his intention being to stop the boat. He was absent for a minute or two only, and, on his return, the other bag also was missing. An action being brought against him by the bailor for the loss of both bags, the question was left to the jury whether there was not gross negligence, although the bailee's own money was in the same valise. The jury were directed to consider whether the party used such diligence as a gratuitous bailee ought to use under such circumstances, and they found a verdict for the plaintiff for the first bag lost, and for the bailee for the second.

The degree of care required of the mandatary, is materially affected by the circumstances attending the execution of the contract, such as the kind and value of the goods bailed and their liability to injury. Lord Stowell puts this case in point: "If I send a servant with money to a banker and he carries it with proper care, he would not be answerable for the loss, though his pocket were picked by the way. But, if instead of carrying it in a proper manner and with ordinary caution, he should carry it openly in his hand, thereby exposing valuable property so as to invite the snatch of any person he might meet in the crowded population of a large town, he would be liable; because he would be guilty of *negligentia malitiosa*, in doing that from which the law must infer that he intended the event which has actually taken place."[1]

So, also, the captain of a vessel who carries the goods of another, though not for hire, is bound to take prudent care of them; and where he intermeddles with the chest of a seaman, who has been casually left behind, he is bound to restore it to its former state of security, particularly if the

[1] The Rendsberg, 6 Rob., 141, 155.

contents be valuable. Thus in Nelson v. Macintosh,[1] an action of case for so negligently carrying plaintiff's box, containing doubloons, dollars and other valuables that the box and its contents were lost; plaintiff came on board the *Arundel*, of which the defendant was captain, at Trinidad, with the intent to work his passage home, but being casually on on shore when the signal was given for sailing, was left behind.

Plaintiff's box was stowed with others on the quarter deck, and soon after departure, was opened by the defendant, upon a suggestion that it might contain contraband goods. The box was fastened with a lock and the lid was also nailed down; having ascertained the contents, the lid was replaced and nailed down again. Towards the termination of the voyage, the captain again opened the box in the presence of the passengers, and placed the contents in a canvass bag which he deposited in his own chest in the cabin, where he usually kept his own valuables. On arrival at Gravesend, a river pilot was taken on board and the captain and one mate left the vessel, another mate remaining on board; an excise officer was also on board, and two young men belonging to the vessel who slept in the cabin. On the next morning the captain's trunk containing the valuables was missing and not afterwards found. The defendant introduced evidence tending to show that the property had been stolen by persons unconnected with the vessel. But Lord Ellenborough, before whom the action was tried, charged the jury that in a case like this, though a person does not carry for hire, he is bound to take proper and prudent care of that which is committed to him, and he left it to the jury to consider, 1st. Whether the captain had not, under the circumstances, by the intermeddling and removal, imposed on himself the duty of carefully guarding against all perils to which the property was exposed in consequence of the alteration. 2d. Whether he had in fact carefully guarded the property; and that if they were of the opinion that the conduct of the defendant had imposed upon him the duty

[1] 1 Starkie N. P., 188.

of carefully guarding the goods, and that he had been guilty of negligence, they were to find for the plaintiff; and the jury rendered a verdict for the plaintiff.

It is evident from the above, as well as other cases, that the rule of liability is relaxed or rendered stringent so as to meet the circumstances of each particular case. The principle, indeed, remains the same in all cases, but its application is left mainly to the jury, who find from the circumstances whether there has been a loss through negligence. The mere mandatary, it is to be observed, is liable only for gross negligence; this is the general principle.[1] Gross negligence is the omission of that care which bailees without hire, or other mandataries of common prudence, are accustomed to take of property of the like kind. Articles of great value, such as may be easily injured, demand a greater degree of care than those of less value. Money, jewelry, and pictures are of this description.[2]

In respect to money received by a mandatary, without hire, to deliver to another, there is an implied contract that he shall deliver it, or return it, or account for it in a reasonable time; if he neglect to do either, it has been adjudged that an action of assumpsit lies against him; the money being enclosed in a letter, and neither of them accounted for, will, it seems, be taken as evidence of gross neglect. There must be in such case, however, a demand made upon the mandatary and a neglect or refusal by him to account for the package, before this presumption of gross neglect can arise.[3] The demand and refusal being shown, he is bound to account for the loss and to indemnify the mandator, unless he can show the property lost without fault on his part; that is, without gross negligence.

The engagement of the mandatary partakes of the nature of a trust, in the execution of which a strict fidelity is required of him; as much as this is implied in a remark

[1] Stanton v. Bell, 2 Hawks, 145; Lodowski v. McFarland, 3 Dana, 205; Tracy v. Wood, 3 Mason, 132.

[2] Graves v. Ticknor, 6 N. Hamp., 537.

[3] Beardsley v. Richardson, 11 Wend., 25.

quoted from one of Cicero's speeches, that the ancient Romans considered a mandatary as infamous if he broke his engagement, not only by actual fraud, but even by more than ordinary negligence.[1] The confidence reposed in him was evidently regarded as creating an obligation which could not be violated without dishonor, without incurring the infamy attaching to the betrayal of a trust. But this is rather a statement of the obligation, as it is felt by an honorable and faithful man, than a strictly accurate definition of the legal duty; for the law does not, as we have seen, hold the mandatary, without reward, to so srict a rule of responsibility as it imposes upon the bailee for hire. It prefers rather to base the obligation of the contract upon a consideration of benefit, or of actual trust, coupled with the custody of property; but in some instances, a moral obligation arising out of a preëxisting and valuable consideration, is regarded as sufficient to support an express promise or undertaking, such as a debt barred by the statute of limitations.[2]

Receiving the custody of the property gives validity to the undertaking of the mandatary to perform his actual engagements with respect to it, and obliges him to exert himself in proportion to the exigence of the affair in hand. Thus, if a person accept money from one man to deliver over to another, the acceptance and undertaking is a sufficient consideration to maintain the action of assumpsit for not paying it over.[3] So where an agent undertakes to effect an insurance, if he fail to do so, it is his duty to give notice to his principal, for a breach of which duty the action of assumpsit will lie.[4] So also, in an action of assumpsit against a bailee, where it was proved that the defendant, a coffee-house keeper, having custody of money without reward, lost it, and made the following statement: that he had unfortunately put it with a large

[1] Jones on Bailm., 63.

[2] Cook v. Bradley, 7 Conn. R., 57, Where a legal obligation has once existed, it may be made the basis of a future undertaking valid in law. A mere moral obligation, which does not arise out of a preëxisting legal duty, will not support a promise.

[3] Wheatley v. Low, Cro. Jac., 667.

[4] Callendar v. Oelrichs, 1 Arnold R., 401.

sum of money of his own, into his cash box, which was kept in his tap room; that the tap room had a bar in it and was kept open on a Sunday, but the rest of his house which was inhabited, was not open on Sunday; and that the cash box, with his own and the plaintiff's money, had been stolen on that day. The judge left it to the jury to say whether the defendant was guilty of gross neglect; and instructed them that the loss of the defendant's own money did not necessarily prove reasonable care.[1] The charge of the judge in this case was afterwards held good, and it was decided, first, that the question of gross negligence was properly left to the jury; and second, that there was evidence upon which they might find for the plaintiff.

The duty of the person employed without remuneration, is to act faithfully and honestly, and not to be guilty of any gross or corrupt neglect in the discharge of that which he undertakes to do.[2] One who undertakes voluntarily and without reward, to enter a parcel of goods for another, together with a parcel of his own of a similar kind, at the custom house for exportation, but makes an entry under a wrong denomination, whereby both parcels are seized, is not held liable to an action. If the custody of the property which is the subject of the contract, is delivered under such circumstances as will authorize the inference that the transaction was as much for the interest of the owner as for that of the bailee, as where in Louisiana, pending a negotiation of sale, a slave was delivered on trial, the contract becomes one of ordinary bailment; and being mutually beneficial to both parties, the same care is exacted of the bailee which every prudent man takes of his own goods, and the party receiving them is answerable only for ordinary neglect.[3] The bailee would not in this case be bound to keep the slave constantly under his eye; nor would the bailee be liable if he permit him to go a short distance from his house and he run away.

[1] Doorman v. Jenkins, 2 Adolph. and Ellis, 256.

[2] Dartnal v. Howard, 4 Barn. and Cres., 345.

[3] Nichols v. Roland, 11 Martin R., 192; De Fonclear v. Shottenkirk, 3 John. R., 170.

The case of De Tollenere v. Fuller,[1] shows how much the nature of the contract is modified by the circumstances attending its execution. The defendant hired of the plaintiff certain slaves, and refused to hire an old female slave, who was connected with the others, but agreed that she should live with them to cook and take care of the sick, and he sent her to another place to nurse a sick person, where he was warned that the small-pox prevailed, and she having died there of the disease, the bailee was held liable for her value.

The Contract.

An ingenious writer in the American Jurist, maintains that there is, in fact, no *contract* formed between the mandator and the mandatary; and that though the mandatary is liable for misfeasance in the execution of his trust, he is so, not by virtue of his contract, but for his *tort*.[2] This theory is maintained in an elaborate article, the argument in which proceeds mainly upon the form of action, usually case, which is brought for the violation of the trust; the question of liability being always tried and decided on the plea of *not guilty*.[3] "The form of the action is not assumpsit, but case; the plea is not *non-assumpsit*, but not guilty. In this view of the matter there is no inconsistency, no principle is violated, every thing is congruous. The bailor's want of right to sue for non-feasance, is entirely consistent with his right to sue for misfeasance. Assumpsit cannot be for misfeasance as such. If you sue for misfeasance, your action is grounded on *tort*, not on contract. It arises *ex delicto*, not *ex contractu*. If there be a binding contract *to do*, and misfeasance in the execution of it, you may, generally speaking, bring assumpsit; but then the gist of your action is the non-performance of the contract; and you must take care to declare on the non-performance, and use the misfeasance as evidence of it; for if there be misfeasance, the contract is not performed as it was agreed to be, and of course assumpsit lies for the breach."

[1] 1 Rep. Con. Ct., 117. [2] Vol. 16, page 275. [3] Idem, 262.

This distinction is very nicely drawn, but the difference between calling the undertaking of the mandatary a contract or a trust is not very broad. In either case, the obligation arises out of the relation of the respective parties to each other, and the *tort* or wrong consists in the failure to perform the act undertaken, with the degree of care which that obligation imposes upon him. Commentators and judges have uniformly spoken of this undertaking as a contract, treating and enforcing it as such, as often as it has been brought before a judicial tribunal, or discussed as an elementary question. It is none the less a contract because, in most cases, it is implied by law; whether a recovery may be had for its violation, depends upon the plaintiff's showing that the defendant has failed to discharge the obligations it cast upon him, that is, has failed to do the act with proper care. Though the form of the action be case, it is usual and necessary to incorporate into the complaint the substance of the contract, and the plea of not guilty puts in issue simply the allegations of damage or loss by the negligence alleged.[1] Other matters must be pleaded specially, as in actions of assumpsit. In the action of case, against a common carrier, the plea of not guilty operates only as a denial of the loss or damage through the default or negligence charged, but it does not put in issue the fact of the receipt of the goods by the defendant as a carrier for hire, nor the purpose for which they were received.

Assumpsit and case are in many instances concurrent remedies, under a practice so long established that it has interwoven itself with the first principles of the common law. Mr. Justice Littledale thus states the distinction between these two forms of action, from which we shall perceive how far the *tort* differs from a breach of contract: "Where there is an express promise, and a legal obligation results from it, there the plaintiff's cause of action is most accurately described in assumpsit, in which the promise is stated as the *gist* of the action. But where, from a given state of

[1] Appendix to Warren's Law Studies, 2 ed., p. 37; see also form of declaration, Yates' Pleadings, 371.

facts, the law raises a legal obligation to do a particular act, and there is a breach of that obligation and a consequential damage, there, although assumpsit may be maintainable upon a promise implied by law to do the act, still an action on the case, founded in tort, is the more proper form of action, in which the plaintiff, in his declaration, states the facts out of which the legal obligation arises, the obligation itself, the breach of it, and the damage resulting from that breach. For that is the most accurate description of the real cause of action; and that form of action, in which the real cause of action is most accurately described, is the best adapted to every case."[1]

The consideration for the contract or undertaking of the bailee or the mandatary, in the action of case, is always stated to be the delivery of the goods at the instance of the defendant for the purpose contemplated by the parties; following which, comes the allegation that it became the duty of the defendant to take due care of the property so intrusted to him, and redeliver or carry the same according to the understanding under which it was received; then follows the allegation of a breach of duty, namely, an averment that the defendant, not regarding his duty in that behalf, did not take proper care of the thing bailed, whereby ensued damage or loss to the plaintiff. On a plea of not guilty, to such a declaration, though it put in issue only the question of negligence, it is evident that the cause of action arises in part out of the contract set forth by way of inducement. If we call it an implied contract, as it is in most cases, and the breach of the duty imposed by law a *tort*, the tort itself grows out of a failure to perform the duty or engagement implied by law from the relation into which the parties have entered towards each other. So that the emphasis, which the writer in the American Jurist places on the fact, that the remedy here is by an action of *tort*, can hardly be held to negative the existence of a contract.[2] Indeed, though there be an express contract on

[1] Burnett v. Lynch, 5 B. and C., 609.

[2] 16 American Jurist, 264 to 275.

which an action of assumpsit would lie, still, if a common law duty results from the facts, the party may be sued in tort for any neglect or misfeasance in the execution of the contract;[1] the action, however, is then grounded on the misfeasance, and the contract is stated as matter of inducement.

It is plain that the form of pleading, while it may sometimes illustrate the principles of law on which the rights of parties may depend, does not determine this question. The cases all hold that there is a contract, and that the owner's trusting the mandatary with the goods is a sufficient consideration to oblige him to a careful management.[2] An executory contract, to assume the duties of a mandatary to be performed at some future day, is not binding; but the breach of a trust undertaken voluntarily is a good ground for an action.[3] The actual entry upon the thing and taking the trust upon himself is held a consideration. Mr. Justice Story puts this case by way of illustrating the principle involved: "If A should intrust a letter to B, containing money, to pay his note at a bank in Boston, due on a particular day, and B should gratuitously undertake to deliver the letter, and take up the note on that day, and he should neglect to carry the letter, or to take up the note, whereby the note should be protested, and A should suffer a special damage, B would, at the common law, be liable to an action for his negligence, and the delivery of the letter to B, under such circumsances, would be a part execution, and a sufficient consideration to support the action."[4] The same would be the case, no doubt, where the mandatary gratuitously engages to carry other property from one place to another; the engagement coupled with an actual receipt of the thing bailed creates the contract and binds him to its fulfillment.[5] The contract does

[1] Burnett v. Lynch, 5 B. and C., 609; Boorman v. Brown, 3 Q. B., 511; Tillinghast's Forms, 418.

[2] Ld. Raym., 909; 3 Salk., 11.

[3] 1 Roll. Abr., 10; 2 Hen., 7, 11; Elsee v. Gatward, 5 T. R., 143.

[4] Story on Bailm., § 171; Shillabeer v. Glyn, 2 Mees. and Welsb., 145.

[5] 2 Ld. Raym., 909.

not become perfect till some act is done by way of its execution.

In Smedes v. Utica Bank, Mr. Justice Woodworth states the doctrine thus: "When one party intrusts the performance of a business to another, who, without consideration, undertakes, but wholly omits to do it, no action lies, notwithstanding the plaintiff may have sustained special damages; but if the party enters upon the execution of the business, and does it amiss through the want of due care, by which damage ensues to the other party, an action will lie for the misfeasance. In the case of Thorne v. Deas, this question was ably discussed, and all the authorities examined, and the result of the investigation sanctions this distinction."[1]

In the case of a note deposited with a bank for collection, endorsed in blank, the bank will be liable in an action of assumpsit for any neglect to give due notice to the endorser of protest for non-payment, or for neglecting to present the same duly for payment.[2] But the actions in which the duty or contract of the mandatary has been enforced, are nearly, if not quite, all of them actions on the case.[3] The deposit, however, of a note in a bank for collection by one of its customers is not a contract of mandate, since the advantage to the institution of receiving the deposits of its customers constitutes a valid and substantial consideration for the undertaking to present the note for payment, and protest it in due form where it is not paid.[4] The deposits of a bank in successful operation for a number of years, are found to average a fixed sum, on which it is prudent to discount beyond what its capital alone would justify. So that the custom of receiving notes for collection is not founded on mere courtesy, but with a view to the interests of the institution; it being the source from which a profit may and does

[1] 20 John. R., 372–9; Miller v. Drake, 1 Caines, 45; Foster v. Fuller, 6 Mass. Rep., 58.

[2] Story on Bailm., § c., 171; Allen v. Merchants' Bank of N. Y., 22 Wend., 215.

[3] The Bank of Utica v. McKinster, 11 Wend., 473; Yates' Pleadings, 246; 3 East, 62, 70; 16 Amer. Jurist., 264.

[4] 20 John. R., 380.

arise. This general advantage is held a good consideration to maintain the action of assumpsit against the bank, on its failure to perform its implied undertaking, that if the note is not paid on demand, it will give notice thereof to the indorsers.[1]

The same duty is imposed upon a bank, receiving a note for collection, under the civil law, though it is there regarded as a gratuitous undertaking. One, who undertakes the business of another, and, being capable of managing it, neglects to do so with due care, is responsible; if he be not capable he is still answerable, for he ought not to have engaged to do that which he could not perform.[2] The duties of a mandatary are, however, limited under the Code of Louisiana to a reasonable care. The directors of a bank, from the nature of their undertaking, fall within this class of cases where ordinary care and diligence only are required. It is not contemplated, that they should devote their whole time and attention to the institution to which they are appointed, and guard it from injury by constant superintendence. Other officers, on whom compensation is bestowed for the employment of their time in the affairs of the bank, have the immediate management. In relation to these officers, the duties of directors are those of control; and the neglect which would render them responsible for not exercising that control properly, must depend on circumstances, and be tested in a great measure by the facts of the case. If nothing has come to their knowledge to awaken the suspicion of the fidelity of the president and cashier, ordinary attention to the affairs of the institution is sufficient. If they become acquainted with any fact calculated to put prudent men on their guard, a degree of care commensurate with the evil to be avoided is required, and a want of that care certainly makes them responsible.[3]

[1] Story on Bailm., § c., 171. The case of Smedes v. The Bank of Utica, seems to have been misapprehended by Mr. Justice Story; 3 Cowen R., 662; the Supreme Court assumes that there was an actual consideration, as stated in the text; and their judgment is sustained by the Appellate Court; 20 John. R., 372.

[2] Durnford v. Patterson, 7 Martin R., 460.

[3] Percy v. Mellandor, 20 Martin R., 68, 73–75.

It seems that permitting the president and cashier to discount notes from the funds of the bank, without the assent and intervention of the board of directors as required by the rules of the bank, will be treated as such a disregard of duty as will render the directors liable to the stockholders for any loss thereby occasioned.[1] A director's relation to the business of the institution, and his responsibility connected therewith, give him the right to inspect its books and examine into its affairs;[2] by accepting the trust imposed by his election, he is charged with the duty of taking all reasonable care in the management of the concerns of the bank.

Every misuse or misappropriation of the goods intrusted to the mandatary, will render him liable, being a breach of the contract under which he receives them.[3] A misuser of the goods in contravention of the trust will amount to a conversion of them, and this of course renders the mandatary liable for their value, since by such act he appropriates them as his own.[4] After such an unauthorized assertion of title, or the right of control over the property, the mandatary will be charged with every risk attending it.[5] This follows logically from the fact that any conduct or act which amounts to a conversion, renders the mandatary responsible for the property, so that the owner may recover the same, or its value, in an action as he may elect.

Mr. Justice Story mentions another class of mandates, not known to the common law, which under the civil code were called the *quasi contract* of *Negotiorum Gestor*, where a party spontaneously, and without the knowledge or consent of the owner, intermeddles with his property, as to do work on it, or carry it to another place.[6] The duties imposed upon the

[1] 20 Martin R., 68; Hodges' Heirs v. Durnford, 13 Martin R., 100.

[2] The People v. Throop, 12 Wend., 183.

[3] De Tollennere v. Fuller, 1 So. Car. Const. R., 121; Ulmer v. Ulmer, 2 Nott and McCord, 489.

[4] Holbrook v. Wright, 24 Wend., 169; Brown v. Hotchkiss, 9 John. R., 361.

[5] Sargent v. Giles, 8 New Hamp. Rep., 325.

[6] Story on Bailm., § 189; Bacon's Abridg. Account; Dane's Abridg., ch. 8, art. 2.

mandatary in such a case are similar to those assumed by the mandatary in ordinary cases of actual contract, except that in some instances he is held to the exercise of greater skill and prudence in the management of the business so undertaken. Under such a rule, we should expect that "actions on this species of contract would, indeed, be very uncommon, for a reason not extremely flattering to human nature; because it is very uncommon to undertake any office of trouble *without compensation;*" and especially where an increased diligence is demanded by reason of the undertaking's being voluntary.[1] The severity of this rule is sometimes modified so as to adjust itself to circumstances.[2]

Remedies.

At common law the contract of mandate, which is generally implied by law from the circumstances of the transaction, is sometimes permitted to be enforced by a third person; as, if A sends money to B, to pay a debt which he owes to C, the latter, it is held, may recover the same in an action against B. The doctrine of the case of Berly v. Taylor, is to this effect. Mrs. Clifton of Baltimore, being indebted to the plaintiffs in New-York, and finding herself in failing circumstances, sent a case or package of goods to the defendant, a part of which was put up in paper boxes and directed to the plaintiffs. She intended that the plaintiffs should receive those goods in part payment of her debt, of which she advised them by letter at the same time that the goods were forwarded. The goods must have been received by the defendant and the letter by the plaintiffs about the same time. Sixteen days after that, the defendant sold all the goods which came from Mrs. Clifton, including those which were intended for the plaintiff as well as those intended for his own house, and converted the same into money. The plaintiffs did not advise Mrs. Clifton that her proposition was accepted, nor did they act upon the matter in any form until a month after the sale, when they demanded the goods of

[1] Jones on Bailm., 57–8; Story on Bailm., § 189.

[2] Code of Louisiana, art. 2274; Bayon v. Prevot, 4 Martin R., 58.

the defendant; and it was adjudged that the plaintiffs might recover in an action of assumpsit, for the value of the goods.[1]

Where, says Chancellor Kent, a trust is created for the benefit of a third person, though without his knowledge at the time, he may affirm the trust and enforce its execution.[2] And he cites cases, that where the trust regards personal property, it may be enforced at law.[3] By affirming the trust, the person for whose benefit it is created acquires the right to insist upon its execution; and being beneficial to him, his assent to the trust will be presumed until the contrary appear.[4] The facts of the case, above quoted, were regarded as constituting a sale of the goods as between Mrs. Clifton and the plaintiffs in the suit; but they were in the hands of the defendant as a mandatary, under an implied contract to deliver them to the plaintiffs.

In many instances the bailor has an election, to sue on the bailee's implied contract, or to waive the contract and resort to case or trover, according to the nature of his injury. These forms of action are now abolished in this state under the Code, but the nature of the actions remains the same as before, and the defendant may be arrested and held to bail for injuring or converting personal property in actions not founded on contract as heretofore. This, in some cases, is a material consideration in the choice of the action to be brought, or in the manner of setting it forth; if it be an action sounding in tort, or for the recovery of personal property unjustly detained, or if it be brought against an agent or other person acting in a fiduciary capacity, the defendant may be arrested and held to bail.[5] It is otherwise where the action is founded on a simple breach of contract.

[1] 5 Hill, 577. See also the cases there cited. This is one of those cases where the owner has a right to waive the tort and bring an action of assumpsit for money had and received. Putnam v. Wise, 1 Hill R., 240.

[2] Cumberland v. Codington, 3 John. Ch. Rep., 261.

[3] Shepard v. M'Evers, 4 id., 138.

[4] Berly v. Taylor, 5 Hill 577.

[5] Code of Procedure, § 179; Brown v. Treat, 1 Hill, 225.

Although all the forms of action are abolished, still we must, in determining the law on a particular subject, in the first place inquire under what forms the

The bailor cannot sue in trover, or in an action in the nature of trover, unless there has been a wrongful conversion of the property; and when he sues in that action, it is not to recover damages for the non-performance of any contract, but to obtain redress for the tort. The contract of bailment may be given in evidence for the purpose of proving the plaintiff's title, and showing that the property was in possession of the defendant; but the contract is not the foundation of the action. An action in the nature of assumpsit, it is true, may be brought directly on the contract implied from the bailment; but the action of trover sounding in tort is brought for the wrongful appropriation of the property.[1]

The action of trover lies against a bailee who, having property in his possession under a stipulation to deliver it at a particular place, on a demand made, refuses to deliver it at all. By denying the right of the bailor he makes himself answerable for the property in the proper action. If the demand is made at the wrong place, and he answer that he is ready to deliver at the right place, there will be no breach of his duty; but an absolute refusal, though made at a place where he is not bound to produce the goods for delivery, will render any further demand unnecessary.[2] This holds true wherever property is in the hands of a mandatary or general bailee, on a trust connected with its custody or disposition; it must be disposed of, surrendered, or delivered, in the manner, and at the time and place, contemplated in the contract.

Factors.

An agent or factor, intrusted with the goods of his principal to sell, cannot, at common law, pledge the same so as

right claimed was formerly asserted, and then ascertain from adjudged cases whether an action could be sustained upon the facts of the case under consideration, in any form heretofore used. Per Mr. Justice Denio, in Hull v. Carnly, 1 1 Kernan R., 510.

[1] Sydam v. Smith, 7 Hill, 182.

[2] Dunlop v. Hunting, 2 Denio, 643; Scott v. Crane, 1 Conn. 255; Higgins v. Emmons, 5 id., 76; Slingerland v. Morse, 8 John. R., 474; Mason v. Briggs, 16 Mass., 453; 2 Kent's Comm., 508.

to authorize the pledgee to hold them for advances made thereon to the factor or agent, even if he supposed the latter to be the real owner of the goods. The contract is to sell and not to pledge the goods,[1] and it is not altered even where the principal has drawn upon the factor in anticipation of the sale; the factor cannot even pledge so as to transfer his lien to the pawnee. This rule is founded upon the principle that he who deals with one acting *ex mandato*, can obtain from him no better or different title than that which his mandate authorizes him to give.[2]

Our statute, relative to principals and factors or agents, which provides that one who is intrusted with the possession of the goods of another for the purpose of sale, shall be deemed the true owner, so as to give validity to his disposition of them for money advanced, does not protect one who makes advances on the goods to the factor, with knowledge that he was not the owner of the goods.[3] The act was designed for the protection of those who may deal with the person intrusted with the apparent and generally recognized evidence of the ownership of the property offered for sale. In respect to third persons dealing with the party in possession, without knowledge of his real character, in the usual course of business, the factor is deemed the true owner; but he cannot misapply the property intrusted to his possession, and confer on a party, who is privy to such misapplication, a right by purchase or pledge, superior to the rights of the true owner. The statute, indeed, only carries into effect and extends the familiar principle, that possession is *prima facie* evidence of title, to commercial transactions, with a view to protect those who, on the faith of such possession, purchase the goods or advance money on them. The true character of the possession being known to the purchaser, he is not misled, and cannot acquire title in derogation of the right of the true owner.

[1] Patterson v. Tash, 2 Strange, 1178; Daubigny v. Duvol, 5 T. R., 604; Stevens v. Wilson, 3 Denio, 472.

[2] Fielding v. Kymer, 2 Brod. and Bing., 639; Graham v. Dyster, 6 Maule and Sel., 1.

[3] Statute of 1830, p. 203; 2 R. S., p. 59, 60, 61, 3d ed.

It is a question of evidence with regard to the title; the statute makes the possession of property by a factor or commercial agent for sale, evidence of his title, to all persons who purchase of him on the faith thereof; but where he knows the contrary, he cannot be misled, nor can he acquire title as against the owner by such a purchase. In respect to a negotiable promissory note, though possession is *prima facie* evidence of ownership, the contrary may be shown; and when it has been stolen, a recovery thereon will be defeated, unless the holder has received it for a valuable consideration, without notice or reasonable ground to suspect a defect in the title of the person from whom it is taken in the usual course of business.[1]

A simple consignment of goods unexplained, by the well settled rule of commercial law, only shows that the consignee is thereby constituted the authorized agent of the owner, whoever he may be, to receive and sell the goods and account for the proceeds.[2] The bill of lading is the usual and legal evidence of the sale, trust or agency under which the property is consigned. But the factor is not a mandatary, since he usually receives the property to sell on commission, and always receives a compensation for his services bestowed upon the business of his agency.[3] His contract is the same as that of the mandatary, in most respects, but his obligation is more rigorously construed, from the fact that he receives a reward for his labor.

The Contract, how determined.

Mr. Justice Story enumerates the following ways in which the contract of mandate may be determined: "1st. By the

[1] Stevens v. Wilson, 3 Denio, 472; Stalker v. McDonald, 6 Hill, 93; Coddington v. Bay, 20 John. R., 637; Swift v. Tyson, 16 Peters' Rep., 1; The bona fide holder of a negotiable instrument for a valuable consideration, without notice of the facts which implicate its validity, as between the antecedent parties, if he takes it under an endorsement made before it becomes due, holds the title unaffected by those facts.

[2] Conard v. The Atlantic Insurance Co., 1 Peters, 444; 7 Cowen, 328; 2 Hill, 151.

[3] 1 Cowen's Trea., 88; Beawes' Lex. Mer., 44, 45.

[4] Jones on Bailm., 98; 4 Comst. R., 498.

death of the mandatary when the mandate is wholly unexecuted; for if it be executed in part, his personal representatives may, in some cases, be obliged to complete it. So, if there be joint mandataries, and the bailment be of such a nature as to require the united advice or skill of all, the death of one dissolves it; but not otherwise. 2d. By the death of the mandator, when the mandate is wholly unexecuted. If, however, it be partially executed, his representatives may be bound to complete it, in order to prevent an injury to the mandator. 3d. By incapacity of the parties; as by marriage, if the party be a female; or by insanity or idiocy. 4th. By a renunciation of his agreement by the mandatary, before he has entered upon the execution of it; or by the express or implied revocation by the mandator; and such dissolution operates from the time notice is received. 5th. By the bankruptcy of the mandator. Where the mandatary is to execute a mere authority, his own bankruptcy will not necessarily dissolve it, although it may, if the act be done, involve the expenditure of money."[1]

The death of the mandatary, leaving the mandate wholly unexecuted, can scarcely be said to terminate the contract, since a part execution is regarded as the consideration necessary to give it validity.[2] No contract is created that can be enforced against the mandatary, until he has taken the trust upon himself, or done some act in part execution of it. Whether, where he has partly executed the mandate, and dies, leaving it unfinished, his representatives can be compelled to assume this personal trust, does not seem to have been decided. No doubt they can be compelled to restore the subject of the contract, but it is not easy to point out the form of action by which a specific performance of the contract can be enforced. It should seem that the death of the mandatary would terminate a contract in the nature of a personal trust, so far at least as to leave his representatives at liberty

[1] Story on Contracts, § 706.

[2] Shillabeer v. Glyn, 2 Mees. and Welsb., 145; Whately v. Low, Cro. Jac., 668; Coggs v. Bernard, 2 Ld. Raym., 909; Wilkinson v. Coverdale, 1 Esp. R., 75; 2 Kent's Comm., 4th ed., p. 643, 644.

to restore the thing bailed and thus determine the contract. So, where the mandator dies, leaving a contract of mandate wholly unexecuted, the authority, or trust reposed in the mandatary is ended; like a power of attorney, it is revoked by his death.[1] In one sense the mandatary acts as the agent of his mandator; and the rule is, that an agency cannot outlive the principal, unless the agent's authority is coupled with an interest, which is never the case in a contract of mandate under the common law.[2] A joint authority to two agents ends with the death of one of them; and if they be mandataries intrusted with a business requiring the exercise of a joint discretion, they cannot go forward, because the terms of their contract require a joint action.[2]

A renunciation of his undertaking by the mandatary before he has entered upon its execution, is in effect a refusal to make a legal contract, and is not properly the determination of a contract of mandate. This follows from the decisions, which make the entry upon its execution, the consideration to support the mandatory's agreement.[3] An implied revocation by the mandator may happen by his death, but its effect upon the contract will depend upon the circumstances of the case, from which the law will imply an obligation to surrender the trust in a way that shall be agreeable to equity.[4] When dissolved in this manner, it should seem, that the acts of the mandatary before notice of the death, acting in good faith, in the execution of the contract, will be held binding upon his principal's estate.[5] This is so evidently equitable that we scarcely demand an authority in support of the principle; it results in fact from the contract implied by law. Where, however, A delivers money to B,

[1] 2 Kent's Comm., 3d ed., 642.

[2] Id., 645, 643, 644. See also, 1 Cowen's Trea., 3d ed., 101; Story on Bailm., § 202–212.

[3] Coggs v. Bernard, 2 Ld. Raym., 909–920; Co. Litt., 112, b; id., 180, b; Bacon's Abr., Authority C.

[4] 1 Bell's Comm., § 413, 4th ed.; 8 Wheaton. 174; Hunt v. Rousmaniere's Adm., 2 Mason, 244.

[5] 2 Kent's Comm., 4th ed., p. 643–4–5; Code Louisiana, art. 3001; 1 Bells' Comm., 488, 5th ed.

to pay a note about to fall due, and A dies, and the fact of his death is known to B before payment, the contract is at en end, and B must restore the money.[1] But if B receives money from A for the use of C, no doubt B would be protected in paying over the same to C, since he is liable to C, in an action for the money.[2] Money or personal property in the hands of an agent or mandatary, at the death of the principal, goes to his representatives; and as the authority to complete the mandate is terminated by the death of the mandator, the law imposes upon the mandatary the duty to restore the thing bailed to the party who represents the estate.

Qui facit per alium facit per se; in other words, the acts of a principal done by an agent, are his, just the same as if done by himself. And hence, as a dead man can do no act, all contracts made in his name after his death by an agent are void, even though made in ignorance of his death.[3] Accurately speaking, there can be in such case no legal contract, whatever undertaking the agent may enter into. A mandate which includes within the trust an authority to contract, will end with the death of the mandator, though as between his estate and the mandatary acting in good faith, the latter may be protected. An executory contract, made by the mandatary, in pursuance of such authority, after the mandator's death, clearly cannot be enforced by the third person with whom it is made. In respect to the authority to contract, he acts under an agency, which is terminated by death; while in reference to other matters connected with the trust, the contract of mandate will remain in full force.[4] Where a contract has been entered into before the principal's death, and his agent has been directed by him to perform some act by way of its execution, the agent, it seems, will be justified in completing the transaction after his principal's death, notwithstanding the administrator forbids it;[5] as if there be

[1] 2 R. S., 3d ed., p. 147. A's representative takes the personal estate.

[2] Berly v. Taylor, 5 Hill, 577.

[3] 6 East. R., 356; 2 Mason R., 244; 8 Wheaton, 174.

[4] Park v. Hammond, 6 Taunt., 495; S. C., 4 Camp., 341; Mallough v. Barbour, 4 Camp., 150; 3 do., 357.

[5] Nicholet's admr. v. Pillot, 24 Wend. R., 240.

a virtual assignment of notes for a valuable consideration, and by authority of the principal before his death, the agreement may be subsequently completed by a delivery of the notes in pursuance of the agent's previous instructions.

The interesting case of Mactier v. Frith involved a discussion as to the time when a contract negotiated between persons residing at a distance from each other, through the medium of letters, will be regarded as finished.[1] In this case it was held, that an offer to sell, made by letter, standing open and unretracted, becomes a contract of sale as soon as it is accepted; even though the person making the offer dies before he receives the knowledge of the fact.[2] The contract is complete at the moment when the minds of the parties meet. The person making an offer to sell by letter, is considered as making it during every instant of time his letter is traveling to its destination, and the contract is completed by the acceptance of it. It is necessary that the minds of the contracting parties should meet on the subject of the contract, but not necessary that they should know the fact that they meet, in order to make it valid,[3] as was held in a sister state.[4] If the person making the offer die, lose his reason, or write a second letter revoking the offer contained in the first, before it is accepted, there can be no contract of sale. The civil, the common law and the law of France agree in this respect.[5] The will of the party making the

[1] 6 Wend. R., 103; Vassar v. Camp., 1 Kernan R., 441. In this case the Court of Appeals affirm the doctrine laid down in Mactier v. Frith.

[2] Adams v. Lindsell, 1 Barn. and Ald., 681.

[3] Mactier v. Frith, 6 Wend. R., 103.

[4] McCullock v. Eagle Ins. Co., 1 Pick., 278.

[5] Pothier Traite du Contract de vente, p. 1, § 2, art. 3, No. 32.

The passage from Pothier is as follows: In order that this consent may take place where the contracting parties are in different places, it is necessary that the will of the party who has written to the other, proposing a sale, should continue until his letter has reached the other party and he has declared that he accepts the offer. This will is presumed to have continued, if nothing appears to the contrary. But if I have written to a merchant at Livourne a letter proposing to sell him a particular article for a specified price, and before my letter has been received by him, I write to him a second declining to make the contract, or if before that time (i. e. before my letter is received and the offer contained in it accepted) I am dead, or have lost the use of my reason, although the mer-

offer may precede that of the party accepting, yet it mus continue down to the time of the acceptance. Once made

chant at Livourne, ignorant of my change of will, death or loss of reason, should, on receiving my letter, accept the offer contained in it, there would be no contract of sale; for my will not having continued down to the time when this merchant had received my letter and accepted the proposition contained therein, there was not that concurrence or meeting of our minds required to make a contract of sale. This is the opinion of *Bartholus* and of the other doctors of the civil law quoted by *Bruneman, ad. l.* 1, § 2 *ff, de contrat empt*, who have correctly rejected the contrary opinion of the commentary *ad dictam legem.*

This doctrine, says Mr. Justice Marcy, which presumes the continuance of a willingness to contract, after it has been manifested by an offer, is not confined to the civil law and the codes of those nations which have constructed their systems with the materials drawn from that exhaustless *store-house* of jurisprudence; it is found in the common law; indeed, it exists, of necessity, wherever the power to contract exists in parties separated from each other. (6 Wend., 115.)

In Vassar v. Camp, recently decided in the Court of Appeals in this state, Mr. Justice Selden observes: This precise question has been so fully considered, in several modern cases, that it would be a work of entire supererogation to discuss it here. It arose in England in the case of Adams v. Lindsell (1 Barn. and Ald., 681). In that case an offer to sell wool was made through the mail. The offer was received by the plaintiffs on the 5th of September, who wrote and mailed their answer, accepting the offer, the same evening; but this answer was not received until the 9th of September by the defendants, who in the meantime, supposing their offer had not been accepted, had sold the wool to other parties. The action was for the non-delivery of the wool; and if the contractwas regarded as consummated on the 5th of September, when the answer accepting the offer was mailed, the defendants were liable; but if not until its receipt on the 9th, then no liability attached. The court held unanimously that the contract became obligatory on the 5th, when the answer of the plaintiffs was deposited in the mail. In the case of Mactier v. Frith, the same question arose in this state, and was elaborately discussed by our late Court of Errors. The court in that case, by an almost unanimous vote, affirmed the doctrine of Adams v. Lindsell, in opposition to that of McColloch v. The Eagle Insurance Company (1 Pick., 278), in which the Supreme Court of Massachusetts had adopted a different rule. The decision in Mactier v. Frith has since been followed in our own state in the case of Brisban v. Boyd (4 Paige, 17); in the State of Connecticut, in the case of Averill v. Hedge (12 Conn., 424); in Pennsylvania, in the case of Hamilton v. Lycoming Ins. Co. (5 Barr., 339); and in Georgia, in Levy v. Coke (4 Georgia R., 1).

The question has again arisen in England, and been passed upon by the house of lords there, in the case of Dunlop v. Higgings (12 Jurist., 295). In that case, the case of Adams v. Lindsell is referred to and confirmed in the most decided and unequivocal terms. The doctrine of this case, therefore, and that of Mactier v. Frith, must be considered as too firmly settled, both in this country and in England to be shaken or doubted. It is moreover maintained, in the cases referred to, by the most satsfactory and conclusive reasoning. (1 Kernan R., 446, 447.)

the offer is presumed to continue until it is revoked, or countervailed by a contrary presumption.[1]

From what has been said, it is evident that a mandate, as a general principle, including a power to contract in the the name of the mandator, unexecuted, must cease at his death; and that if the contract be previously made, it may be afterwards carried into effect by the mandatary. In some instances, Mr. Justice Story thinks the rule of the common law may not differ from that of the civil code; under which the mandatary in order to prevent loss or injury may proceed after the death of the mandator to execute the mandate; as if fruit be ordered to be sold in a foreign port, and it would perish before proper orders from the administrators could be obtained, the mandatary would be justified in making a sale.[2] This inference seems to be drawn from the usages of trade with respect to factors, receiving property for sale; where in the absence of express instructions, the law implies a power to sell. It gives the factor a discretion, and demands of him a diligent exercise of that discretion in a sale of the goods to the best advantage; if the property be of a perishable nature, so as to require an immediate sale, he may proceed as the usage of business directs.[3]

No doubt, in a case of mandate, where by the terms of the agreement, or from the circumstances attending the transaction, the law implies a similar discretion in the mandatary, he may proceed to execute his contract, notwithstanding the death of the mandator. It is to be observed, however, that the law does not clothe the mandatary, as it does the factor, with any general right to dispose of the property intrusted to his custody; and since he acts gratuitously, he cannot acquire any interest in the goods, through which a right to dispose of them may be continued.

[1] 16 East., 55; 3 Stark. Ev., 1252; Adams v. Lindsell, 1 Barn. and Ald., 681; Gleason v. Henshaw, 4 Wheaton, 228; Brisban v. Boyd, 4 Paige Rep., 17; Paine v. Cave, 3 Term Rep., 148; id., 653.

[2] Story on Bailm., § 204.

[3] Evans v. Potter, 2 Gallison R., 13; Dwight v. Whitney, 15 Pick., 179; Goodenow v. Tyler, 7 Mass. R., 36; 9 Pick. R., 272; 1 id., 343; 15 id., 225.

"By the civil law," says Chancellor Kent,[1] "and the law of those countries which have adopted the civil law, the acts of an agent done *bona fide* after the death of the principal, and before notice of his death, are valid and binding. But this equitable principle does not prevail in the English law; and the death of the principal is an instantaneous and absolute revocation of the authority of the agent, unless the power be coupled with an interest."[2] From which it would appear, that so far as the trust reposed in the mandatary constitutes him the agent of the mandator, it will be revoked by his death; while in respect to the care demanded of him as the custodian of property, his contract of mandate will continue operative and binding: as if one, returning from California, should receive a quantity of gold from a friend at San Francisco, on a gratuitous promise to deliver it to a person named, in New-York, and the owner of the gold should die before the departure of the depositary, though the law might here designate another person to receive the property, it would still hold the mandatary to take faithful care of it, so long as it should remain in his custody.[3] In some instances, probably, the death of the mandator would operate to convert the contract of mandate into a simple deposit, arresting the object of the mandate, and subjecting the mandatary simply to the duty of keeping the property with ordinary care.

A contract of mandate is also terminated by a change in the relation of the parties; as if one of them become insane, it puts an end to the contract. But it seems, that the fact of insanity must be first established by an inquisition, in order to revoke the authority,[4] or release the mandatary.

So, where the principal is a *feme sole* when the contract is made, her subsequent marriage is a revocation of the man-

[1] 2 Kent's Comm., 647, 3d ed.

[2] Hunt v. Rousemaniere, 8 Wheaton, 174; Hunt v. Ennis, 2 Mason's R., 244; Bergin v. Bennet, 1 Caines' Cas. in Error, 1; 6 East's R., 356; Harper v. Little, 2 Greenleaf's Rep., 14; 4 Camp. N. P. Rep., 272.

[3] Tracy v. Wood, 3 Mason's R., 132.

[4] Wallis v. Manhattan Bank, 2 H., 495; 2 Kent's Comm., 345, 3d ed.; Waters v. Taylor, 2 Ves. and Bea., 301.

date; since it concerns her personal property, which, on her entering into this new relation, passes under the control of her husband,[1] who, under the common law, becomes absolute owner of the goods and chattels of his wife, and consequently may dispose of them. This passing of the title to another person, suspends the authority delegated to the mandatary under the trust on which he received the goods.[2] This was the rule of the civil law, and Mr. Justice Story thinks it applies equally to the marriage of the mandatary, since her husband's rights may be affected by her conduct.[3]

As the mandatary acts gratuitously, having no interest in the subject of the bailment as against his principal, it follows that the mandator may at any time revoke the mandate. He has the right to recall the trust and resume possession of the property;[4] or he may transfer the property to another, and with it the right of revocation. For the purpose of its termination, the relation between the mandator and mandatary resembles very closely that of principal and agent, with this exception, that the agent sometimes has an interest coupled with a power, which the mandatary never has. To make the revocation of the trust effectual, notice must be given to the mandatary;[5] but this may be done by the appointment of another to relieve him of the trust,[6] or by the return of the mandator when the trust had been created, to continue during his absence. In general, whatever act of the mandator is inconsistent with the continuance of the trust, or signifies to the mandatary his intention to recall it, will have that effect.

Under the English law, the bankruptcy of either of the parties puts an end to the contract of mandate, and is regarded as a revocation of the authority.[7] As this point does

[1] White v. Gifford, 1 Rol. Abr., 331, tit. *Authoritie;* Charnley v. Whinstanley, 5 East's Rep., 266; 1 Salk. Rep., 117–309.

[2] Udall v. Kenney, 3 Cowen's Rep., 599.

[3] Story on Bailm., § 206; 2 Roper, *Husband and Wife*, 69, 73.

[4] Story on Agency, § 500; 7 Ves. Jr., 276; 1 Bell's Comm., 489, 5th ed.

[5] Salt v. Field, 5 Term Rep., 215; 5 Binn. R., 216; Wallace R., 126.

[6] Copeland v. Mercantile Ins. Co., 6 Pick., 198.
Merritt v. Forrester, 4 Taunt. R., 541; Parker v. Smith, 16 East. R., 382.

not appear to have been decided in our courts, we are left to infer that the contract of trust will continue until the goods which are the subject of it are seized in execution or by some legal process. This would seem to be the necessary inference from the fact that we have in this country no law of that nature; for a bankrupt law proper is not made for the relief of the debtor, but rather for his punishment. It acts upon him *in invitum*, creates a forfeiture of his estate, and authorizes its seizure.[1] It is made for the special benefit of the creditor, and can only be set in motion at his instance. The voluntary branch of our bankrupt law of 1841, allowing a man to declare himself a bankrupt and demand a discharge of his debts, was a departure from the principles of the English law;[2] under which bankruptcy is a condition fixed by legislative provision,[3] designed to aid creditors as against the bankrupt.

It is evident that the insolvency of one or both of the parties, will not of itself operate to dissolve a contract of mandate, though a seizure of the goods under process against the mandator, will undoubtedly have that effect. As to the mandatary, it is not easy to perceive why a trust which confers no interest upon him that can be seized in execution, should be terminated by his want of pecuniary responsibility. If the mandator is willing to rely upon his fidelity, it does not appear that any other person can have a right to object, or terminate the trust.[4]

Burden of Proof.

In actions against the mandatary, as in others, the burden of proof rests on the plaintiff to establish his cause of action, by proving each material fact necessary to create the liability.[5] If the plaintiff in an action of case alleges the delivery of money, inclosed in a letter, to the defendant, and

[1] Sackett v. Andross, 5 Hill, 327.

[2] 1 Dane Ab., 317; 34th and 35th H., 8, ch. 4; 13 Eliz., ch. 7.

[3] 2 Bell's Comm., 214–161–2; Bailey's Dic.; 6 Geo. IV., ch. 16.

[4] Story on Agency, § 486.

[5] Williams v. East India Co., 3 East. R., 192; Doorman v. Jenkins, 2 Adolph. and Ellis R., 80.

that he undertook and promised to take care of and carry the same safely from one place to another, and then deliver the package to the plaintiff; and that, although a reasonable time had elapsed, the defendant had not done so; the plaintiff will be bound to show, among other things, that the money was lost by the defendant's negligence, or could not be obtained on request. By showing a demand and refusal to deliver the package after a reasonable time, he will be entitled to recover, unless the defendant account for the loss by showing the package lost without fault on his part, that is, without gross negligence.[1] The evidence that the defendant refused to give any information in respect to the package, would change the burden of proof from the plaintiff to the defendant; or, submitted to the jury without explanation, it would be sufficient to render the mandatary liable.

When the mandatary has converted the property to his own use, and an action in the nature of trover is brought against him for the conversion, the burden of proof lies on the plaintiff to show that the defendant has assumed to himself the property and right of disposing of the plaintiff's goods.[2] The action assumes that the defendant came lawfully into possession of the goods, and it is sustained by showing a breach of the trust, or an abuse of such lawful possession. This familiar principle is applicable to *choses in action* as well as to chattels. If the mandatary, intrusted with the goods of another, puts them into the hands of a third person, contrary to orders, it is a conversion.[3] So, if he be intrusted with a promissory note to be used in a specified manner, and he dispose of it differently, it is a misuse or disposition of the note contrary to orders, which will sustain the action.[4] Even where the plaintiff has repossessed himself of the thing bailed, the action may be sustained for the breach of trust, which is a conversion;[5] and the amount

[1] Beardslee v. Richardson, 11 Wend., 25.
[2] Baldwin v. Cole, 6 Mod., 212; McCombie v. Davies, 6 East., 540.
[3] Syed v. Hay, 4 Term Rep., 260.
[4] Murray v. Burling, 10 John. R., 172.
[5] 2 Esp. N. P., 190, 191; Ingalls v. Lord, 1 Cowen R., 240.

of the recovery will depend upon the nature of the case. If it be a negotiable note, which has been transferred for value to a *bona fide* holder, and afterwards paid by the plaintiff, the recovery will be for the face of the note.[1]

In order to maintain an action in the nature of trover against a mandatary, who always comes legally into possession of the property, it is necessary to show a demand and refusal, or an actual conversion. The rule was held differently where the possession itself was tortious, which is an actual conversion.[2] The general principal is that a demand and refusal, as against one who has chattels in trust for another, are *prima facie* evidence of a conversion;[3] but this evidence may be overcome by counter testimony, going to negative the presumption of a conversion arising from such refusal on demand. The effect of the demand will depend upon the present relation of the parties at the time it is made; if the defendant refuses to deliver the goods according to contract, he having the possession, he becomes liable for them.[4]

An action in the nature of trover against a bailee, does not lie for negligence, nor for goods lost, or taken from him;[5] it proceeds upon the assumption that he has usurped the right of property over them, by converting them to his own use.[6] Coming lawfully into the possession, it must be shown that that he has sold or otherwise converted the goods.[7] Where, however, the title is in the plaintiff, and it is shown that the property was wrongfully taken from his possession, the burden will be cast upon the defendant of showing that *he* came to the possession of the property, by purchase or bailment, and without any fault on his part.[8] This again, it seems,

[1] 2 Esp. N. P., 190, 191; Ingalls v. Lord, 1 Cowen R., 240.
[2] Bates v. Conkling, 10 Wend., 389; Brown v. Cook, 9 John. R., 361.
[3] Packard v. Getman, 4 Wend., 613.
[4] 1 Taunt., 391; 4 Esp., 157.
[5] Salk., 655; 5 Burr., 2825.
[6] Storm v. Livingston, 6 John. R., 44.
[7] Barret v. Warren, 3 Hill, 348; Acker v. Campbell, 23 Wend., 372; M'Carty v. Vickery, 12 John. R., 348.
[8] 3 Hill, 351.

will transfer the burden of proof to the plaintiff, to show a demand of the property, and a refusal, or some other act of conversion.[1]

The action, in the nature of assumpsit for money had and received, may be brought against a bailee or trustee who has converted the property into money; but in order to maintain this action against two trustees jointly for money had and received to the use of the *cestui que trust*, the plaintiff must prove a joint promise, either express or implied. The fact that each of the defendants, who are trustees under an assignment for the benefit of creditors, has admitted the receipt of funds equal to the demand of the plaintiff, one of the creditors, and expressed his willingness to distribute the same according to the terms of the trust, does not raise an implied promise, such as will support an action at law against the defendants jointly, as for money had and received.[2] Each trustee is answerable for his own acts only; this is the general rule; and the law will not imply a joint promise on the separate statements or admissions of each.

Property delivered and received as money, will support the action precisely the same as if money itself had been delivered and received.[3] And it is not necessary in all cases, to give positive evidence that the defendant has received money belonging to the plaintiff; but where, from the facts proved, it may fairly be presumed the defendant has received the plaintiff's money, the plaintiff may recover in this action for money had and received to his use.[4] In general, this action cannot be supported unless the defendant has in fact received money to the plaintiff's use.[5]

Change of Title, Forms.

A recovery in the action of trover, which is so frequently adopted as the most convenient remedy against bailees in

[1] 10 Wend., 389.
[2] De Forest v. Jewett, 2 Hall R., 130.
[3] Ainslée v. Wilson, 7 Cowen R., 662.
[4] Tuttle v. Mayo, 7 John. R., 132.
[5] Beardsley v. Root, 11 John. R., 465.

solvent circumstances, and a satisfaction of the judgment, change the property, so as to vest it in the defendant.[1] The plaintiff elects to recover damages for the conversion, and that operates to pass the title on payment of the recovery. The measure of damages in the action, as a general rule, is the value of the property at the time of the conversion, with interest from that date.[2] In some instances, if the chattel be not of a fixed and determinate value, its worth at the time of conversion is not the rule of damages, but they may be enhanced according to the increased value of the chattel subsequent to that time.[3] The reason for this is very plain; if the mandatary sell the goods delivered to him in trust, the sale is a conversion; but if the goods afterwards advance in value, and the mandator subsequently demand them, he may, it would seem, recover their enhanced value at the time the demand was made. The wrongful sale does not work a change of the title; and it is a doctrine as old as the year books, that the owner of property is entitled to its enhanced value, until it has been so changed as to alter the title.

The title is not changed by the act of conversion, nor by the exercise of acts of ownership over the property. The owner of timber may reclaim it when made into shingles,[4] or converted into coal,[5] notwithstanding it has lost its primitive form. So long as he can prove its identity, he may follow and retake it in whatever new shape it may have been wrongfully made to assume. By bringing his action of trover, the owner makes his election, to demand the value of the property at the time and place of conversion.[6] But proof that the defendant refused to deliver it on demand, shows a conversion at the time when the demand is

[1] Osterhout v. Roberts, 8 Cowen R., 43; Livingston v. Bishop, 1 John. R., 290;

[2] Kennedy v. Strong, 14 John. R., 128; Clark v. Pinney, 7 Cowen R., 681.

[3] Fisher v. Prince, 3 Burr., 1363; Whitlen v. Fuller, 2 Bl. Rep., 902; Rensselaer Glass Factory v. Reid, 5 Cowen R., 587; West v. Beach, 3 Cowen, R., 82.

[4] Betts and Church v. Lee, 5 John. R., 349; 5 Hen. VII., 15; 12 Hen. VIII., 10.

[5] Curtis v. Groat, 7 John. R., 168; Babcock v. Gill, 10 John. R., 237.

[6] Dillingback v. Jerome, 7 Cowen R., 294; Kennedy v. Strong, 14 John. R., 128; Baker v. Wheeler, 8 Wend. R., 505; Suydam v. Jenkins, 3 Sand. Superior C. R., 628, and the cases there cited.

made; the refusal being itself a conversion, it is doubtful whether the defendant would be permitted to show a prior act of conversion with a view to a reduction of damages. That would be permitting him to found a defence upon his own wrongful act.

Notwithstanding a new code of procedure has obliterated the distinction between actions at law and suits in equity, and abolished the well known forms of actions hitherto used in this state, the remedies by suit remain still essentially unchanged;[1] because the principles of law remain as heretofore. The plaintiff must allege facts that constitute a cause of action, and the allegations of his complaint must show a right of recovery under principles hitherto applied to the actions of replevin, case, trover and the others.[2] The statement contained in his complaint, must include every fact necessary to establish a right of action known to the law. And, since the principles of the common law, as well as the principles of pleading under it, must be studied and learned chiefly from the decisions which have been made under forms of action now disused, it is evident that the plaintiff's complaint must be drawn with at least a tacit reference to the requisites of pleading used in some one of those forms.[3] Though the statute has abolished the forms, it has not separated them from the adjudications which have blended them together for a long course of years. The terms, assumpsit, case, trover, &c., convey the idea of distinct and well known causes of action, so that it is still more convenient to use them in speaking of legal principles than to adopt the circumlocution necessary to express the same ideas in popular language. This, it is hoped, will be a sufficient apology to the new code, for the free use made in this essay of terms which, though abolished in practice, have an established, standard signification. The single term,

[1] Hall v. Southmayd, 15 Barb. S. C. Rep., 32; Horner v. Wood, id., 371; Barker v. Russell, 11 Barb. S. C. Rep., 303, and Rodgers v. Rodgers, 595.

[2] Boyce v. Brown, 7 Barb. S. C. Rep., 80, and the cases there cited.

[3] Childs v. Hart, 7 Barb. S. C. Rep., 370, and Rayner v. Clark, 581; Garvey v. Fowler, 4 Sand. R., 665.

trover, which has been so commonly used as a remedy for the violation of the contract of mandate, describes a cause of action brought for the unlawful detention or conversion of goods; in which the plaintiff's right to them, their value, and the defendant's conversion of them, were put in issue and necessary to be proved.[1] The plaintiff must have either a general or special property in the goods, and a right to the immediate possession; and where the defendant is a mandatary, it must be shown that he has been guilty of some breach of trust, which the law regards as a conversion of the property to his own use. We describe the suit accurately under the new procedure, by calling it an action in the nature of trover.[2]

In this action against the mandatary, it would seem that the court will stay the proceedings on the defendant's paying the costs and restoring the subject of controversy; not, however, where special damages are claimed for the conversion, nor unless its value remains unchanged.[3] The plaintiff recovers the current or market value of the property at the time of the conversion shown, with interest from that time until the trial; and he will not be compelled, pending the litigation, to accept the property diminished in value.[4]

The interest of the mandatary in the chattels intrusted to his custody, is substantially the same as that which the depositary has in the subject of the deposit, and is sufficient, as we have seen, to enable him to protect the property against all persons but the rightful owner.[5] As what has already been said with reference to the rights of the depositary in this respect, will apply to the rights and duties of the mandatary, in the execution of his contract of mandate, it is unnecessary to renew the discussion here.[6]

[1] Tharpe v. Stallwood, 5 Mann. and Gr., 761; Armorie v. Delamirie, 1 Strange, 505; Meny v. Greene, 7 Mees. and W., 623.

[2] The Manhattan Co. v. Bentley, 13 Barb. S. C. Rep., 641; Conway v. Bush, 4 Barb. S. C. Rep., 564.

[3] Fisher v. Prince, 3 Burr., 1363; Whitlen v. Fuller, Black. R., 902.

[4] Suydam v. Jenkens, 3 Sand. R., 614.

[5] Ante, p. 64, 65, 66.

[6] Story on Bailm., § 93, 150, 151, 152; Sutton v. Buck, 2 Taunt., 309; Duncan v. Spear, 11 Wend., 54.

Sir William Jones mentions certain exceptions from the rule concerning the degree of neglect for which a mandatary is responsible, as where there is a special agreement, a voluntary offer, or an interest accruing to both parties or to the bailee mainly.[1] But since the essence of the contract requires that it be undertaken gratuitously on the part of the mandatary, it results that if the mandatary acquire a benefit from the trust, it is no longer a contract of mandate; it becomes one of ordinary hire.[2] As for the other exceptions, there is no reason why the mandatary may not increase his liability by a direct stipulation for more than ordinary care;[3] and it appears, that if he spontaneously and officiously offers to do the act, he may be responsible beyond the case of gross negligence, and be held to answer for slight neglect.[4] The reason given for this increased responsibility, where a man spontaneously proposes to undertake the trust, is, that he may thereby prevent the owner from intrusting them with a person of more approved vigilance.[5] But as the owner acts voluntarily, there does not seem to be any sound reason why a friend, whose kindness prompts him to offer his services, should be held to a stricter rule of liability than is demanded of a stranger. Indeed, the rule, though well established in the civil law, from which it is quoted, has not the sanction of decisions under the common law; and it may be well doubted whether, in an appropriate case, it would be deemed worthy of adoption.[6] To speak with strict propriety, negligence is not permitted in any contract; but a less rigorous construction prevails in some than in others. The trustee of personal property, who undertakes the trust gratuitously, is bound to discharge it with the same care and vigilance which he bestows upon his own goods; less than this exhibits a want of active good faith.[7]

[1] Jones on Bailm., 63.
[2] Jones on Bailm., 53; Story on Bailm., § 215.
[3] Kettle v. Brumsale, Willes R., 118, 121.
[4] 2 Kent's Comm., 572–3; Jones on Bailm., 48.
[5] D., 16, 3, 1, 35; Jones on Bailm., 48.
[6] Story on Bailm., § 81, 82.
[7] Jones on Bailm., 30, 31.

The law will not sanction a trust, as in the case of an assignment for the benefit of creditors, which in express terms exonerates the assignee from accountability for any loss that may be sustained by the trust fund, unless the same happen "by reason of his own gross negligence or wilful misfeasance." The legal principle, which demands of the trustee the same care and solicitude that a prudent person, or a man of reasonable or ordinary diligence, would use for himself, cannot be thus evaded.[1]

[1] Litchfield v. White, 3 Sand. S. C. R., 545. An assignment, containing such a clause, is void.

CHAPTER IV.

GRATUITOUS LOANS.

A LOAN is a gratuitous grant for temporary use, on the express or implied condition that the specific thing shall be returned. A loan of articles to be returned in kind, as money, wine, corn and other things that may be valued by number, weight or measure, is a contract of another species; in which, as the specific things are not to be returned, the absolute property in them is transferred to the borrower,[1] who must bear the loss of them if destroyed in any manner. The loan for consumption, under the Roman as well as the common law, constitutes a sale; but a loan for use does not pass title to the thing bailed.[2] Mr. Chancellor Kent defines a loan for use to be a bailment, or loan of an article for a certain time, to be used by the borrower without paying for the use. This is but a slight variation from the definition given by Sir William Jones: "Lending for use, is a bailment of a thing for a certain time, to be used by the borrower without paying for it."[3] And this also corresponds very closely with that given by Mr. Justice Story, from the civil law, namely, "the grant of a thing to be used by the grantee gratuitously for a limited time, and then to be specifically returned."[4]

Elements of the Contract.

The circumstances and object of the loan usually enter into the contract, so as to fix its limitation as to time and

[1] Jones on Bailm. 64; 102; Hurd v. West, 7 Cowen, 752.
[2] 2 Kent's Comm., 573, 574, 3d ed.
[3] Jones on Bailm., 118.
[4] Story on Bailm., § 219.

use; as if a carriage be borrowed for a day, or a horse to go a particular journey, it is implied that they shall only be used for the time and purpose contemplated. If they be used differently, it is a breach of the trust under which they are loaned, and the borrower will be liable for any injury to them, or loss, even by accident.[1] The use must be strictly confined to the time and object for which the loan is made. If a horse be lent to go to London, and he be driven towards Bath, in another direction, or if he be borrowed for a week and kept for a month, the borrower becomes responsible for any casualties that may happen in the journey towards Bath, or after the expiration of the week; this illustration, adopted by Sir William Jones, is but the repetition of the one used in a leading case on the law of bailments.[2] Driving the horse beyond the place designated, will be held a conversion of the property, which will support the action of trover.[3]

The benefit being all on one side, the borrower is bound to use extraordinary diligence in taking care of the thing borrowed, and he is responsible even for the slightest neglect; he must exercise all the care and diligence that the most careful persons are accustomed to apply to their own affairs, and in his case the omission of the most exact and scrupulous caution is regarded by the law as a culpable neglect. If his fault or neglect contribute in any degree to the injury or loss, he is liable. If he return the loan by the hand of another, he is bound to employ an agent or servant upon whose skill, experience and prudence he can place an entire reliance; and the servant so employed, for whose acts and omissions the master is responsible, is bound to the same extraordinary care as the master himself.[4]

The borrower cannot free himself from liability by showing that the proximate cause of the loss was the wrongful act of a third person, unless it clearly appears that the act

[1] Coggs v. Bernard, 2 Ld. Raym., 909, per Chief Justice Holt; Wheelock v. Wheelright, 5 Mass. R., 104; Jones on Bailm., 68.

[2] Jones on Bailm., 68; 2 Ld. Raym., 909.

[3] 5 Mass. R., 104; Bringloe v. Morriece, 1 Mod., 210; 3 Salk., 271.

[4] Scranton v. Baxter, 4 Sand. R., 5.

could not have been foreseen or prevented, and that no fault of his contributed to create or enhance the peril.[1] As, if the borrower of a horse, leave the usually traveled highway for a dangerous road, infested with robbers, or travel in the night at an unseasonably late hour, and the horse be taken from him or killed, he must indemnify the owner; because he cannot excuse himself by showing an irresistible force, when he puts himself in the way of it by his own rashness.[2] So, if he ride by a ruinous house, in manifest danger of falling, and it actually fall and kill the horse, he will be responsible for his value; though he would not be answerable if the house, being in good condition, fell by the violence of a sudden hurricane.

If the thing loaned be not returned at the expiration of the time for which the loan was made, the law casts the burden of proof upon the borrower, to show that it has been destroyed by inevitable accident, or the wrongful act of some third person, which could not have been foreseen or prevented, by the exercise of extraordinary care and diligence.[3] The obligation to act with vigilance is enforced rigorously upon him, who alone receives benefit from the contract; but no impossibility is demanded of him, and he is not liable for loss by theft or robbery.[4] Thus, if Caius borrows a silver ewer of Titius, and afterwards delivers it, that it may be safely restored, to a bearer of such approved fidelity and wariness, that no event could be less expected than its being stolen, and the bearer is met on the way by thieves, who contrive to steal it, Caius is not liable.

Ordinarily, the borrower is required to know his own ability to take the requisite care of the property intrusted to him, and the rule of responsibility is strictly enforced. He is presumed to know the law, which is not partial and does not adapt itself to the peculiarities or failings of individual

[1] Story on Bailm., § 241.

[2] Jones on Bailm., 68.

[3] Jones on Bailm., 66; 4 Sand. R., 5.

[4] Jones on Bailm., 44–66. The illustration is from the civil law, but the principle seems to have fully adopted with us. Story on Bailm., § 239.

men,[1] and he has no right to delude his neighbor by engaging in a contract of loan. It is asserted, by Sir William Jones, that if the lender be not deceived, but perfectly know the quality as well as the age of the borrower, he must be supposed to have demanded no higher care than that of which such a person was capable; as if Paul lend a fine horse to a raw youth, he cannot exact the same degree of management and circumspection which he would expect of an experienced horseman or an officer of dragoons. Mr. Justice Story comments upon this passage, and agrees that in this case, as in the case of a deposit, or a mandate, the bailor may, in many cases, fairly be presumed to trust to the known habits and character of the bailee, and to content himself with that degree of skill or diligence, or ability, which he is known to possess.[2]

Notwithstanding this doctrine appears to have the approbation of writers of elimentary works, it does not seem to be supported by any adjudications at common law; and it may well be questioned whether it is to be considered as varying the rule of diligence demanded of the borrower. In practical application it would require a judicial investigation of his character, and permit him to prove his own customary heedlessness, or infirmity of character, as an excuse for neglect, which ordinarily renders the borrower liable.[3] It would be to establish, not a uniform principle of responsibility, but a flexible rule, graduated to the circumstances and habits of the borrower in each particular case.[4]

The mandatary,[5] we have seen, may be held liable for the loss of money intrusted to him, though he take the same care of it as he does of his own, where it is shown to have been lost through his gross negligence. To lessen the borrower's responsibility, below the rule fixed by law, it would be necessary, it should seem, to show a state of facts from which it

[1] Jones on Bailm., 46–95; Story on Bailm., § 237.
[2] 2 Kent's Comm., 574; Story on Bailm., § 237.
[3] Jones on Bailm., 46; Tompkins v. Saltmarsh, 14 Serg. and R., 275.
[4] The William, 6 Rob., 316.
[5] Tracy v. Wood, 3 Mason R., 132; 2 Kent's Comm., 562.

might reasonably be left to the jury to find a special contract to that effect.[1] If the lender know the borrower's character and how the thing loaned is to be used, it may sometimes be no more than a fair inference that the lender agreed to require no greater care than the borrower is capable of bestowing. As, if a person lend a horse to a friend, whose style of driving he is well acquainted with, to be harnessed with another and driven to a place named within a given time, it may fairly be presumed that the lender agreed to assume the usual risks attending the use contemplated.

The civil law, which is quoted to show that the character of the borrower, being known to the lender as that of a careless or rash man, will lessen his liability, makes nicer distinctions than seem to be recognized under the common law.[2] Thus the Code of Louisiana lays it down as the general principle, that the depositary is bound to use the same diligence in preserving the deposit, as he uses in preserving his own property[3]; and then provides that the principle shall be enforced rigorously where the deposit has been made at the depositary's request, where he is to have a reward, where it is solely for his advantage, or where it has been agreed that he should be answerable for all neglects. The same principle is here applied to the depositary in all cases, only in some it is enforced with greater rigor; it being left to the discretion of the court to determine when the circumstances of the case dispense with, or demand severity in its application.

The style of the common law is very different; under it the jury make the application of the principles, announced by the court, to the facts established on the trial; and the principles of law are not said to be enforced leniently or rigorously according to circumstances.[4] The facts proven

[1] The William, 6 Rob. R., 316.

[2] 2 Kent's Comm., 574; Jones on Bailm., 46–65.

[3] Code of Louisiana, art. 2908 and 2909. The edition quoted in these notes is that of 1838, with annotations by Wheelock S. Upton, L. L. B., and Needler R. Jennings.

[4] Jones on Bailm., 118, 119, 120.

may bring the case under one, or another principle of law, but we do not speak of the court as growing lenient or rigorous in its enforcement, nor of the principle as capable of adjusting itself to a sliding scale of care or neglect.

The Borrower's Interest.

Under the contract of loan for use, the possession and transient property is transferred for a particular time or use, on condition to restore the goods so borrowed as soon as the time is expired or use performed. The borrower gains a temporary property in the thing loaned, on an implied condition to use it with moderation and not abuse it; and the lender retains a reversionary interest in it.[1] This temporary property acquired by the borrower is not a legal interest as against the lender;[2] it is in substance the possession, to which the law attaches the right to protect the property by action against a wrong-doer.[3] He has an interest in the custody and safety of the property, because he is answerable for it to the lender;[4] and this possessory interest will enable him to maintain an action against any one who wrongfully interferes with the thing loaned. The general property remains in the lender; and it has been seriously questioned whether it is proper to speak of the naked baileee as having any property whatever in the goods bailed,[5] though it is well settled that he has a right of action against third persons, for the defence of the goods, whenever he is liable over to the bailor.[6]

It is not disputed that a bailee, having a lien on the goods bailed, has a special property in them; and so, the bailee for hire has a valuable interest in the subject of the bailment, for the time contemplated in his contract.[7] He has

[1] Cro. Jac., 236; 2 Black. Com., 453.

[2] Burton v. Hughes, 2 Bing. Rep., 173; Hurd v. West, 7 Cowen R., 752.

[3] Story on Bailm., § 93.

[4] Rooth v. Wilson, 1 B. and A., 59.

[5] Norton v. People, 8 Cowen R., 137; Ludden v. Leavitt, 9 Mass. R., 104; Waterman v. Robinson, 5 Mass. R., 303; Warren v. Leland, 9 Mass. R., 265.

[6] Burton v. Hughes, 2 Bing. R., 173; Sutton v. Buck, 2 Taunt. R., 302; Poole v. Symonds, 2 New Hamp. R., 289–70; Story on Bailm., § 93.

[7] Cro. Jac., 236; 2 Saund. R., 476; 2 Black. Comm., 453.

purchased the use of the goods, and acquired a right of control over them during the continuance of the contract.[1] He has an interest, for the time being, in their possession, which he can enforce against the owner himself;[2] and his right of possession excludes that of the owner until the term for which he has hired the goods has expired.[3] Till then, the bailee, and not the owner, has a right of action for their recovery, which presupposes the right to reduce them into immediate possession.

The possession of the borrower is not that of a mere servant, and it does not exclude that of the owner, who may in most cases maintain an action for the conversion of the goods by a stranger; and a judgment obtained in his favor will be a good bar to a suit brought in favor of the bailee. Either of them may bring the action, because the bailee's possession is that of the owner, and possession under the rightful owner, is sufficient against a person having no color of right.[4] When the bailee has no interest or claim to hold the goods, coupled with his possession, the rule of law applies that the general property draws after it the possession;[5] so that the owner has the right of immediate possession.

Without doubt the lender, who loans chattels for an indefinite time, retains the constructive possession of them, and is entitled to reduce the goods to actual possession at his pleasure;[6] and it seems he has the power by strict right at all times to revoke the loan,[7] and repossess himself of the property which forms its subject. This right of revocation may in some cases work injustice towards the borrower, where he has borrowed an article for a particular purpose, which remains unaccomplished at the period chosen by the lender

[1] 2 Kent's Comm., 586.

[2] 2 Taunt. R., 268.

[3] Putnam v. Wyley, 8 John. R., 433.

[4] Falkner v. Brown, 13 Wend., 63; 2 Saund., 47; Sutton v. Buck, 2 Taunt., 309.

[5] Thorp v. Burling, 11 John. R., 285; Hall v. Tuttle, 2 Wend., 475.

[6] Orser v. Storms, 9 Cowen R., 687; Smith v. Miles, 1 T. R., 480.

[7] 5 Bac. Ab. Tresp. (C.), pl. 9, 16, 17; Putnam v. Wyley, 8 John. R., 433; 2 Camp. R., 464; Story on Bailm., § 277.

to revoke the loan. Under the Roman law and other codes derived from it, the lender was not permitted to terminate the contract otherwise than as contemplated by the parties to it.[1] But at common law, it appears the borrower, like the bailee under the contracts of mandate and deposit, has no legal interest in the subject of the bailment as against the bailor. The lender, having the general property in the loan, has the right to reduce it to his actual possession whenever he pleases, and is therefore constructively all the while in possession; so that under the old practice he could sustain the action of trespass *de bonis asportatis*.[2]

Mr. Justice Story intimates the opinion, that notwithstanding the lender's right to terminate the contract of loan whenever he pleases, still if he do so unreasonably, while the object of the bailment is but partly accomplished, and actually occasions injury or loss to the borrower by so doing, the latter may have a suit for damages; or may recoup his damages in an action brought against him for retaining the loan under such circumstances.[3] As no authority is cited for this opinion, its weight must depend entirely upon general principles. The owner of a pair of horses, lends them to his neighbor to carry a load of provisions to a particular market; can he, on the way, meet him and demand the immediate possession of the team, leaving the borrower to sustain the injury resulting from such an abrupt and unexpected termination of the loan?[4] It may in this case well be questioned whether the contract of loan for this special purpose, united to the injury resulting to the borrower from its termination before the purpose has been answered, will not justify the borrower in resisting this demand for immediate possession, and be received as an adequate defence

[1] Story on Bailm., § 257.

[2] Root v. Chandler, 10 Wend. R., 110; 7 Term R., 12; 3 Day, 498, 272.

[3] Story on Bailm., § 258. "The ground of this doctrine, as stated in the Roman law, is, that although it is purely a voluntary act to make the loan, and to prescribe the terms thereof; yet when once it is made, the lender would, by an unreasonable withdrawal of the loan, impose a burden rather than a benefit, and thus violate the implied obligation between the parties."

[4] 10 Wend. R. 110; Bac. Abr., 374.

In a loan for use, there is always an implied agreement to redeliver the thing loaned as soon as the time has expired for which the loan was made; or if no time was specified, as soon as the purpose of the loan has been accomplished.[1] Every bailee is bound to redeliver the goods bailed according to the terms of his particular contract; and that of the borrower requires that he return the goods to the lender at the time and place contemplated by the parties. The depositary may retain them until a demand is made for them;[2] and a mandatary is not to be presumed in fault until after he has been called upon for the property intrusted to him;[3] but the borrower must return the loan within the time limited, and an action lies against him if he fail to do so.[4] If he exceed the purposes of the loan, either as to time, or in the manner of using the chattel, he becomes liable.[5]

Parties.

The parties to the contract of loan, as in other cases, must have a legal capacity to make a contract. This is important to be borne in mind, since it may affect materially the remedy of the lender, for an injury to the chattel loaned, under a contract which cannot be enforced at law.[6] Thus, the contract of an infant is not void, but voidable at his election. If a horse is lent to him to go a journey, there is an implied promise that he will make use of great care and diligence to protect the animal from injury and return him at the time agreed upon. But if he pleads his infancy, no action can be maintained against him on this implied promise. If he should sell the horse, an action would lie, and his infancy would not protect him;[7] for that is an election on his part to disaffirm the contract. And so if he be guilty of any wilful and positive act of injury to the animal, an action of

[1] Kent's Comm., 557; Story on Bailm., § 257.
[2] Brown v. Cook, 9 John. R., 361.
[3] Beardsley v. Richardson, 11 Wend. R., 25.
[4] Scranton v. Baxter, 4 Sand. R., 5; 2 Kent's Comm., 574.
[5] Roll. Rep., 128: Bac. Abr. 374; Cro. Eliz., 784.
[6] Campbell v. Stokes, 2 Wend. R., 137.
[7] Vasse v. Smith, 6 Cranch's Rep., 226.

trespass lies against him for the tort;[1] though he is not answerable on his agreement for injuries resulting through his unskillfullness, or want of knowledge and discretion.[2] The law releasing him from the binding force of his contract, is based on the presumption that he has not yet acquired those very qualities of knowledge and discretion; and consequently he cannot be held responsible on his promise, express or implied, to exercise care and diligence requiring them. He is liable for torts, not on matters arising *ex contractu*.[3]

Married women have not a legal capacity to contract; but in respect to matters usually intrusted to her, the wife may act as the agent of her husband; in his absence, the wife is considered to have a general authority over his property, which must be possessed by some one, unless it be expressly shown that he has constituted some other person his agent for that purpose.[4] If the husband intrusts the wife with money to make deposits in some bank for safe keeping, and she does so, opening an account in her own name, and afterwards withdraws the money, it seems, the court will presume she acted with authority.[5] But the contract is that of the husband, since the wife cannot contract in her own name. A loan to her, unless it be made with the authority of her husband, will not raise the usually implied contract by the borrower, though if it have his assent it will be the same as a loan to him. In respect to the other disabilities of parties, it is not necessary here to enter further into the subject; it is sufficient to say, they are similar in all contracts.[6] In general, married women, infants, lunatics, and other persons not *sui juris*, are not capable of contracting, nor can they

[1] 2 Wend. R., 137,

[2] Jennings v. Randall, 8 Term R., 335; Green v. Greenbank, 4 Eng. Com. Law Rep., 377; 2 Marsh Rep., 485.

[3] Homer v. Thwing, 3 Pick., 492; 4 M'Cord's Rep., 387; Bristow v. Eastman, 1 Esp. Rep., 172; Wallace v. Morss, 5 Hill R., 391; Medbury v. Watrous, 7 Hill R., 110.

[4] Church v. Sanders, 10 Wend. R., 79.

[5] Dacy v. The Chemical Bank, 2 Hil., 550.

[6] Story on Bailm., § 229.

appoint an agent or attorney to act for them;[1] but infants and married women, as we have seen, may act as agents for others.[2]

The Loan, how used.

The loan must be used strictly for the purpose and in the manner contemplated by the parties to the contract.[3] If George lend a masked habit and jewels to Charles, to be worn by him at a masked ball to be given on a future night, the use must be confined to that particular occasion; and if on the way to or from the place where the ball is held, the borrower be robbed of them at the usual time of going and returning, he will not be answerable for their value; but if he go from the ball to a gaming house with the jewels, he will be responsible if he lose them there by any casualty whatever. The several cases put by Lord Holt, to illustrate this doctrine, are to the same effect.[4] If a man lends another a horse to go westward, or for a month, and the bailee goes northward, or keeps the horse above a month, if any accident happen on the northern journey, or after the expiration of the month, the bailee will be chargeable, because he has made use of the horse contrary to the trust he was lent to him under, and it may be if the horse had been used no otherwise than he was lent, that accident would not have befallen him.

So where silver utensils are lent to a man for the purpose of entertaining a party of friends at a dinner in the metropolis, and he carries them into the country, the borrower will be responsible if the plate be lost by any accident whatever.[5] One who borrows a horse for his own use, has no right to permit his servant to ride him,[6] for the loan is to be regarded

[1] Snyder v. Sponable, 1 Hill's R., 567; Whitmarsh v. Hall, 3 Denio, 375; The People v. Moores, 4 Denio, 518; Dominick v. Michael, 4 Sand. R., 376; Smith v. Oliphant, 2 Sand. R., 306–711; Crippen v. Culver, 13 Barb. S. C., 424.

[2] Co. Lit., 52, a; 1 Hill's South Car. R., 270; Riley v. Suydam, 4 Barb. S. C. R., 222.

[3] Jones on Bailm., 69.

[4] Coggs v. Bernard, 2 Ld. Raymond, 909.

[5] Jones on Bailm., 69.

[6] Bringloe v. Morrice, 1 Mod. R., 210.; 2 Kent's Comm., 574.

as a strictly personal favor. If lent to go to a particular place, and the borrower go to other places in a different direction, it is a secret and fallacious use of the property, which amounts to a conversion of it.[1] In like manner, where a man makes and lends a note to another, for the express purpose of enabling him to raise money on it from a particular person, he is not permitted to use it in any other way; and if in violation of the trust, he transfer it to his creditor as a security for a precedent debt, it will not be an available security in his hands.[2] Neither will a note, indorsed for the accommodation of the maker, and delivered to him to be used in renewal of a former note about to fall due, but transferred by him as collateral security for the payment of another debt, be enforced against the indorser by the creditor to whom it is transferred.[3]

Notes and bills of exchange are frequently made and indorsed merely for the accommodation of a friend, as a substitute for a loan of money; and where they are made or indorsed for a special purpose, they must be used in accordance with the understanding of the parties. The accommodation maker or indorser, in effect, loans his credit and liability to the person for whose benefit he makes or indorses the note or bill of exchange;[4] but if the note or bill, being negotiable, is transferred to a bona fide holder for value, the maker or indorser will be liable, notwithstanding the violation of the trust under which the note or bill was made or indorsed. As between the parties to the transaction, however, the loan is governed by the same general principles as regulate the loan of chattels.

If the contract of loan, either express or implied, is violated by the borrower, in respect to the manner of using the thing lent, it is deemed in law a conversion of it. This rule of liability is enforced even against one who hires a chattel for use, and the reason for its application to the borrower

[1] Roll. Rep., 128; Bac. Abr., 374.
[2] Beers v. Culver, 1 Hill, 589.
[3] Wardell v. Howell, 9 Wend., 170; Brown v. Taber, 5 Wend., 566.
[4] 1 Cowen's Trea., 200, 201, 3d ed.

is stronger still.[1] As he alone receives benefit from the bailment, it is but reasonable that he should be held to a strict performance of the undertaking on his part.[2] By exceeding the authority delegated to him, he disaffirms the contract and exercises an act of ownership over the property, inconsistent with the rights of the lender.

Where the contract of loan is raised by implication of law, the thing loaned must be used only in the manner for which it is fitted by its nature.[3] The contract implied in law being such as reason and justice dictate, the law presumes that every man contracts to perform it with fidelity, using the borrowed chattel in the ordinary manner.[4] In a loan of a saddle horse for an afternoon, the fair presumption is that the borrower will use it under the saddle; if the loan be to a soldier in service, not anticipating an actual engagement, the presumption is that the borrower will not expose the property of his friend to the perils of a battle field, without his consent.[5] From the circumstances attending the loan, the law implies an agreement, such as the parties are presumed to have entered into, based on the general intendment of courts of judicature that every man hath engaged to perform what his duty or justice requires. A trust is reposed in the borrower at his instance, and it is but natural reason to presume that he engages to perform it with fidelity and care.

A loan for a certain time, as of a horse for a week or a month, is held to give to the borrower an interest in the horse during that time, which will authorize a general use, by himself or his servant; but if no time is specified, the law implies that a personal trust is reposed in the borrower that he alone shall use the chattel.[6] A similar distinction is made between hiring and borrowing a horse to

[1] 2 Saunders, 47, n. g.; 5 Mass. R., 104; 3 Pick., 492; 12 id., 136; Harrington v. Snyder, 3 Barb. S. C. R., 380.

[2] Scranton v. Baxter, 4 Sand. R., 5.

[3] Code of Louisiana, art. 2869.

[4] De Fonclear v. Shottenkirk, 3 John. R., 169.

[5] Story on Bailm., § 268; Jones on Bailm., 70.

[6] Bringloe v. Morrice, 1 Mod. R., 210.

go to a place designated; in the case of hire, there is no implied understanding that the chattel is to be used only by the person making the contract, but such an understanding will be inferred to accompany the gratuitous loan.[1]

The agreement is implied from the circumstances, which show the intention of the parties to the loan, with respect to the use of the chattel. Where one applies to his friend for a loan of his carriage, the object being stated to be the entertainment of his friends or family for a day or an afternoon, the use is confined to the object and time specified.[2] If the object be named, the implication is that the borrower will not depart from it or go beyond its reasonable scope. It was formerly held, that if one borrow a horse to ride to a particular place, and he ride out of his way, and the owner of the horse meet him, he cannot take the horse from him, because the borrower has a special property in the horse till the journey is determined; and being in the lawful possession, the owner cannot violently seize and take it away, since the continuance of all property is to be taken from the form of the original bargain, which in this case was limited till the journey was finished.[3] But if the borrower go to other places, the owner has an action on the case against him for exceeding the purposes of the loan; for to that extent it is a secret and fallacious use of the property. The distinctions here taken are between trespass and trespass on the case, under the old forms of action; *trespass* being sustainable only where a trespass was committed in the taking of the property,[4] while trespass on the case was maintainable for negligence or other breach of legal duty.[5]

But whatever be the form of the remedy, the rights of the parties are limited by the express or implied contract

[1] 1 Mod. R., 210.

[2] Story on Bailm., § 255.

[3] Cro. Jac., 236; Bac. Abr., 374.

[4] Broughton v. Whallen, 8 Wend. R., 474. Though the taking of the chattel is lawful, it may become tortious by any wilful act of injury to it, so as to sustain trespass.

[5] Serjeant v. Blunt, 16 John. R., 75.

between them. If, says Mr. Justice Buller, in Seyds v. Hay,[1] a person take my horse to ride, and leave him at an inn, that is a conversion; for it brings a charge on me. So, if one man, intrusted with the goods of another, puts them into the hands of a third person, contrary to orders, that is a conversion. The case is a very familiar one, that trover will lie when a horse has been let to ride a fixed distance and the bailee goes beyond the distance. The ground of liability in each of these cases, is the violation of the express or implied contract, entered into between the parties, in breach of the trust connected with the bailment.[2] The borrower, having misapplied the loan to a use not contemplated, clearly cannot have a right to retain the property for any other purpose. In one of the early cases, a case of hire is spoken of as a *loan*, using this term in the same sense in which it is frequently used in speaking of a loan of money for use or interest. Mistaking the facts of this case, it has been sometimes asserted that though the borrower use the thing loaned to him in a way different from the understanding of the parties, still the owner cannot retake his property until the expiration of the term for which the loan was made.

Lender's interest in the Loan.

The title to the thing lent, as we have seen, remains in the owner; the use only being transferred to the borrower.[3] The earlier writers speak of the borrower as having a special or qualified property in the subject of the loan;[4] but more recently it is asserted that he has no special property in the borrowed chattel[5]. But this variation of language does not show any variation of principle. The bailee has an interest in the goods bailed, which, in the old action of trover, was frequently spoken of as a special property, in contradistinc-

[1] 4 Term. R., 260.

[2] 1 Bailey, 546; 10 John. R., 172.

[3] 2 Kent's Comm., 574.

[4] Doct. and Stud., D., 2 c, 38; Bac. Abr., 373; 2 Black. Comm., 453.

[5] 2 Kent's Comm., 574; Story on Bailm., § 279, 93–96, 150; Taylor v. Linday, 9 East R., 49; Burton v. Hughes. 2 Bing. R., 173.

tion from the naked possession held by a mere servant;[1] the mere servant could not, while the bailee might maintain the action as against strangers and wrong-doers.[2] Mr. Justice Cowen, in speaking of the distinction between general and special property, says: "*Special* property is where a man holds goods by bailment, or has any temporary interest therein, either in his own right and for his own use, or by authority of law for legal purposes."[3] So, in Bacon's Abridgment, where a man lends sheep or cattle, the borrower is said to have a qualified property in them, according to the purposes for which the loan was made.[4]

The general property is in the lender during the continuance of the loan; and the borrower, being responsible to his principal for the goods intrusted to him, has an interest in them, by whatever term described, sufficient to enable him to maintain an action for their protection[5] against strangers, who wrongfully interfere with the goods. Has he any legal interest in them, as against the owner? Under the Code of Louisiana, the lender cannot take back the thing lent, till after the time agreed on; or, if no agreement is entered into in that respect, not till after it has been employed in the use for which it was borrowed.[6] This provision is clearly founded in good sense and sound reason. The borrower has a right to rely upon the good faith of the lender; and where he receives a chattel for a specified use, and actually commences to use it in the manner stipulated, it may occasion him a serious injury to have it suddenly withdrawn, when the object of the loan is but half accomplished. Such conduct in the lender is little less than a breach of trust, and a breach of a trust undertaken voluntarily is a good ground for an action.[7] The lender has promised the use of the chattel to the borrower; but the law demands, a considera-

[1] Falkner v. Brown, 13 Wend. R., 63.
[2] 2 Saund., 47; 1 East. R., 244; 4 id., 247; Cro. Eliz., 819.
[3] 1 Cowen's Trea., 320, 3d ed.; 1 Caine's R., 14.
[4] Bac. Abr., 373.
[5] 13 Wend. R., 63.
[6] Code of Louisiana, art. 2877.
[7] 2 Lord Raym., 911.

tion to render the promise valid; and that consideration must be either a benefit to the party promising, or some trouble or prejudice to the party to whom the promise is made.[1] In the case we have supposed, the borrower acts upon the promise of the lender, receives the chattel, commences to use it under the contract of loan, and will be injured by its withdrawal before the purpose of the loan has been fully accomplished. It should seem, that here is a valid contract binding upon the lender as well as the borrower, and that the latter does in fact acquire a legal interest in the subject of the loan, a qualified property in it, according to the purpose for which it was borrowed.[2]

Mr. Justice Story considers it a matter of serious doubt whether the depositary, the mandatary or the borrower has any special property in the subject of the trusts respectively committed to them,[3] and he reviews at length the authorities on the question, inclining to the opinion that the general bailee has an interest, well expressed by the phrase, "possessory interest" in the goods bailed, but not a special property. Mr. Justice Blackstone, speaking of the various classes of bailment, says:[4] "In all these instances there is a special qualified property transferred from the bailor to the bailee, together with the possession. It is not an absolute property, because of his contract for restitution; the bailor having still left in him the right to a *chose* in action, grounded upon such contract. And, on account of this qualified property of the bailee, he may, as well as the bailor, maintain an action against such as injure or take away those chattels. The tailor, the carrier, the innkeeper, the agisting farmer, the pawnbroker, the distrainor, and the general bailee, may all of them, vindicate in their own right, this their possessory interest, against any stranger or third person. For, being responsible to the bailor, if the goods are lost or damaged by his wilful default or gross negligence, or if he do not deliver up the chattel on lawful demand, it is therefore rea-

[1] 1 Cowen's Trea., 58, 3d ed.

[2] Doct. and Stud., D. 2 c 38; Bac. Abr., 373; Story on Bailm., § 258.

[3] Story on Bailm., § 93.

[4] 2 Black. Comm., 453; 13 Rep., 69.

sonable that he should have a right of action against all other persons who may have purloined or injured them; and that he may always be ready to answer the call of the bailor." Sir William Jones says, "every bailee has a temporary qualified property in the things, of which possession is delivered to him by the bailor, and has, therefore, a possessory action or an appeal in his own name against any stranger who may damage or purloin them."[1]

Mr. Chancellor Kent, in speaking of the depositary, says: He has, perhaps, strictly speaking, no property, general or special, in the article deposited; that he has only a naked custody or possession, with a right of action, if his possession be unlawfully disturbed, or the property injured.[2] Treating of the loan for use, he says: "the borrower has no special property in the thing loaned, though his possession is sufficient for him to protect it by an action of trespass or trover, against a wrong-doer."[3] Afterwards, however, he states the doctrine in the prevailing language of the books: "As every bailee is in the lawful possession of the subject of the bailment, and may justly be considered, notwithstanding all the nice criticism to the contrary, as having a special or qualified property in it; and as he is responsible to the bailor in a greater or less degree for the custody of it; he, as well as the bailor, may have an action against a third person for an injury to the thing; and he that begins the action has the preference; and a judgment obtained by one of them is a good bar to the action of the other."[4]

Where no time is limited for the continuance of the loan, the lender has undoubtedly, title, and a right to repossess himself of the chattels bailed at any time; the borrower having no right whatever over the chattels as against the lender.[5] The lender has not in such a case the actual, but

[1] Jones on Bailm., 80; Year B., 21; Hen. VII., 14 b, 15 a.

[2] 2 Kent's Comm., 568.

[3] Burton v. Hughes, 2 Bing. Rep., 173; Hurd v. West, 7 Cowen R., 752; 2 Kent's Comm., 574.

[4] Flewellin v. Rave, 1 Bulst Rep., 68; Rooth v. Wilson, 1 Barnw. and Ald. 59; 2 Kent's Comm., 585.

[5] Orser v. Storms, 9 Cowen's R., 687.

the constructive possession, which follows the title, and which exists wherever he has the right to reduce the property to actual possession at any time.[1] This he cannot have where he has transferred to the bailee by a valid contract a right for a specified term to the use of the goods bailed; because in that case he is not entitled to reduce the goods to his possession when he pleases.[2] In Root v. Chandler, it was held that the lender has a constructive possession of the thing loaned; but it appeared in that case that the borrower had exceeded his authority in the use of the chattel bailed; the plaintiff lent a pair of horses to Evan Rice and Stephen Goss, to enable them to retail a load of fish. The horses were lent at Buffalo, and the borrowers had permission to proceed east as far as Clarence, in the county of Erie; but one of them went as far as Batavia, in the county of Genesee, where the horses were seized by the defendant's direction on an execution against Rice. The action was trespass *de bonis asportatis*, and on the trial a verdict was rendered for plaintiff. One of the questions raised on a motion for a new trial, was, whether the plaintiff had a sufficient possession to maintain trespass; and upon this question the court say: "the plaintiff had the general property in the horses; he lent them to Rice to go to Clarence, but no farther; he had a right to reduce the property to his actual possession whenever he pleased; he was therefore constructively in possession, and the action on that ground is well sustained."[3]

The inference would seem to be, that if the borrower had not gone beyond the place named as the limit of the journey, the lender would not have had the right to reduce the property to his actual possession whenever he pleased; which was regarded as necessary to sustain that form of action. But the precise point we are here considering, does not seem to have been decided at common law.[4] The ques-

[1] Putnam v. Wyley, 8 John. R., 433.

[2] Hoyt v. Gelston, 13 John. R., 142 and 561; Aiken v. Buck, 1 Wend. R, 466.

[3] Root v. Chandler, 10 Wend., 110.

[4] Viner's Abr. Bailment D.; Bac. Abr. Bailment D.; Cro. Jac., 687; 2 Roll. R., 440; 1 Strange 165; Sheppard's Epitome, Countermand; Taylor v. Lendey, 9 East. R., 49; 1 Dane's Abr., ch. 17, art. 4, § 10.

tion arises, when one lends chattels to another for a specified time and use, and the borrower receives and applies them to that use, according to the contract, whether the lender retains the right to recall the loan at a time and under circumstances which will prove directly injurious to the borrower; in other words, does the borrower in such a case acquire any legal interest in the promise or grant of the use accompanying the chattels, for the time and purposes of the loan? Mr. Justice Story, after stating the legal right of the borrower to the proper use of the loan under the civil law,[1] says: "These principles are not supposed to have any general foundation in the common law, in which the loan is understood, as to its continuance, to rest upon the good pleasure and good faith of the lender, and to be strictly precarious. As the bailment is merely gratuitous, the lender may terminate it whenever he pleases."[2] The authorities quoted by him apply to a general loan for an indefinite time, in respect to which it is distinctly adjudged that the lender has the right of recalling it at his pleasure.[3]

If the loan be made without any specification as to the time or purpose of its use, it is but a bare license or authority which may be at any time recalled;[4] but if the loan be for a definite time and purpose, there is a contract between the parties, embracing mutual promises, expressed or implied from the circumstances; and the borrower, it should seem, acquires a legal interest in the promise of the lender wherever the execution of the contract has been actually entered upon, and its revocation would work to his prejudice. All the authorities show that there is a contract entered into between the parties, and there does not appear to be any reason why it should not be capable of enforcement by either party.

The right of countermand exists in respect to a license, permission, trust, agency or authority, in which the agent or bailee acquires no legal interest. If one gives money to another to pay over to a third person in discharge of a debt,

[1] Story on Bailm. § 257.
[2] Id. § 257, 277.
[3] Orson v. Storms, 9 Cowen's R., 687.
[4] Sheppard's Epitome, Countermand.

the *cestui que use* may recover it in an action of debt or account against the bailee; but if the money were delivered to the bailee to hand to a third person, to whom nothing was due, the owner has a right to countermand the authority at any moment before it is executed.[1] In like manner, a delivery of goods to A, to the use of B, upon a precedent consideration, may not be countermanded, because it vests the absolute property in B; it being for his benefit, his acceptance is presumed even before it be actually manifested.[2] A person delivering money to another for a charitable purpose, may countermand the authority so long as the money remains in the hands of the bailee, unappropriated according to the purposes of the trust.[3] Indeed, if the power or authority be in its nature legally revocable, it seems that it cannot be rendered irrevocable by any act or stipulation on the part of him who grants it. So long as it is a mere license or authority, granted as a matter of ease, pleasure or trust for the benefit of the bailor, it may be countermanded.[4] If the owner of goods deliver them to a bailee, to be delivered over to a third person, the bailee has no property in them except for the purpose of the trust.[5] But if the bailment is not on a legal or valuable consideration, the delivery is countermandable; and in that case, if the bailor bring an action in the nature of trover, he reduces the property again in himself, for the action amounts to a countermand of the gift; but if the delivery be on a valuable or legal consideration, the bailor cannot maintain his action because he has not the right of immediate possession; he has, for the time being, parted with an interest in it.[6]

Many of the earlier adjudications on the subject of bailments, were made in the old action of detinue, in which it was held a good plea, that the bailment was upon a condi-

[1] Peter Harris v. Peter de Bervoir, Cro. Jac. 687.
[2] Atkin v. Berwick, 1 Strange, 165.
[3] Taylor v. Lendey, 9 East, 49.
[4] Sheppard's Epitome, Countermand.
[5] Roll. Abr., 606.
[6] Bulst., 68; 2 Leon, 30; Yelv., 164.

tion.[1] Rich v. Aldred was an action in detinue for the recovery of a picture of Oliver Cromwell, and Chief Justice Holt, at the trial, illustrated the doctrine thus: If A bail the goods of C to B, and C bring detinue against B for them, B may plead the bailment to him by A to be redelivered to A, and so bring in A as garnishee to interplead with C; and if A bail goods to C and afterwards give his whole right in them to B, B cannot maintain detinue for them against C, because the special property that C acquires by the bailment is not thereby transferred to B.[2]

The result, derived from an examination of the decisions on the subject, is that the lender retains the title to the chattels bailed; that the borrower acquires the possession and a special qualified property in them according to the purposes of the loan, and that for some purposes with respect to third persons, the possession of the bailee is regarded as that of the lender, who may at pleasure reduce the chattels into his actual possession.

The Loan is a personal trust.

The lender is always understood to loan the chattels for the personal benefit of the borrower in whom he resposes a special trust, unless from the circumstances a contrary inference may be drawn.[3] In the loan of a horse to ride to a particular place, it is implied that the use is for the personal benefit and convenience of the borrower; it is a contract in which the borrower engages to bestow his personal care and diligence in the preservation of the thing loaned.[4] If he deliver it over to a servant or agent for return, he is responsible for the same degree of care on the part of the servant which is demanded of him personally.[5] The circumstances under which the loan is made indicate the intention of the parties and give shape to the promise implied by law.

[1] Viner. Abr., D.
[2] 6 Mod. R., 216.
[3] Bringloe v. Morrice, 1 Mod. R., 210.
[4] Burton v. Hughes, 2 Bing. Rep., 173; Hurd v. West, 7 Cowen R., 752.
[5] Scranton v. Baxter, 4 Sand. R., 5.

Bringloe v. Morrice was an action of trespass for immoderately riding plaintiff's mare; the defendant pleaded that the mare was lent to him, and that by virtue of the implied license, he and his servant had alternately rode her. To this plea there was a demurrer by the plaintiff; and the court held that the license for the use of the chattel was annexed to the person of the defendant, and could not be communicated to another; for this riding was a matter of pleasure. Chief Justice North took a difference where a certain time is limited for the loan of the horse, and where it was not. In the first case the party to whom the horse is lent has an interest in the horse during that time, and in that case his servant may ride, but in the other case he may not. He also took a difference between hiring and borrowing a horse to go to York; in the first, the party may permit his servant to ride or use the animal, not in the second.[1]

By the common understanding as well as by the implied contract, a loan bears the character of a personal favor, which in its nature is not transferable. This is the ordinary rule where there is no stipulation on the subject.[2] But it is clear from the case above quoted, that a loan of a chattel for a month, will be understood to confer on the borrower the general use of it by himself or by his servant or family. And so, if from the circumstances the fair inference is that both parties contemplated an use of the thing loaned, requiring the intervention of an agent or third person, the law will imply a contract to that effect: As, if a person should borrow the equipage of a military company for the purposes of a holiday parade, there would be an implied agreement for the use of the equipage in the manner contemplated by the parties to the loan. Or if a person wishing to send a message to another, residing at some distance, should apply to his friend for a loan of his horse for that purpose, the understanding, and the implied contract, would be for the use by the messenger he might wish to send. The contract, in short, is varied almost infinitely, so as to adjust itself to the circumstances of each particular case,

[1] 1 Mod. R., 210.

[2] 2 Kent's Comm, 574.

the undertaking of the borrower as to the manner of the use, having all the while reference to the purposes of the loan; for "the law regardeth the intent of the parties and will imply their words thereunto."

Effect of fraud in procuring the Loan.

Fraud vitiates all contracts.[1] When a sale is procured by fraud, no title passes.[2] A purchase of goods with intent not to pay for them, is such a fraud as will avoid the sale.[3] Though there be a delivery, the possession of the true owner is not divested by a tortious taking, nor where the goods are taken from him by means of fraud.[4] The law does not undertake to define in abstract terms what constitutes fraud; being a question of motive, to be proved from the circumstances attending each particular contract, it is scarcely capable of being defined in general terms.[5] Any misrepresentation or suppression of the truth which ought to be told, tending to and actually misleading the purchaser, avoids the sale. And the effect is the same whether the sale is made by the party himself or by his agent.[6] The circumstances, the *indicia* and earmarks of fraud are frequently defined in the books and in the adjudications of cases, but it is now settled that the question of fraud is always one of fact, involving the intention of the party, to be found by a jury.[7]

Any kind of fraud practiced on the part of the borrower, in order to procure the loan, either by a suppression of the truth or by express falsehood, will avoid the contract and render him liable for all casualties.[8] In this contract, perhaps more than in all others, the law demands openness and honesty, and will not tolerate any concealment of facts that might have a tendency to prevent the loan. Thus, if a soldier

[1] Story on Contracts, § 495.
[2] Root v. French, 13 Wend., 570.
[3] Ash v. Putnam, 1 Hill R., 305; Bristol v. Wilsmore, 1 Barn. and Cres., 514.
[4] Cary v. Hotaling, 1 Hill R., 311, and the cases there cited.
[5] 2 Kent's Comm., 513.
[6] Hill v. Gray, 1 Starkie R., 352; Buck v. Cole, 4 Sand. R., 80.
[7] Jackson v. Timmerman, 7 Wend. R., 436; Young v. Covell, 8 John R., 25.
[8] Jones on Bailm., 70; Story on Bailm., § 243.

were to borrow a horse of his friend for a battle expected to be fought next morning, and were to conceal from him that his own horse was as fit for the service, and if the horse so borrowed were slain in the engagement, the lender ought to be indemnified; for, says Sir William Jones, probably the dissimulation of the borrower induced the lender to made the loan; but, he adds, had the soldier openly and frankly acknowledged that he was unwilling to expose his own horse, since in case of loss he was unable to purchase another, and his friend had nevertheless generously lent him one, the lender would have run, as in other instances, the risk of the day.

One who obtains the loan of a chattel, by a fraudulent misrepresentation, stands in no better relation towards the lender than a trespasser.[1] There is in such case no legal delivery, and no consent to the taking, since consent, in law, is more than a mere formal act of the mind, and must be unclouded by fraud. On a sale procured through fraud and false pretences, the party obtaining the property cannot be convicted of larceny;[2] but the bailee may be so convicted who acquires the custody of the property fraudulently, with an intent to deprive the owner of it. In both cases there is the moral guilt of larceny, but it is not regarded as the same crime under the adjudications.[3] Larceny is defined, by East, to be the wrongful, or fraudulent taking or carrying away, by any person, of the mere personal goods of another, from any place, with a felonious intent to convert them to his (the taker's) own use, and make them his own property, without the consent of the owner.[4] The crime is not committed where the owner intends to transfer the property.[5] The decisions, making this distinction, have been made mostly in actions arising between the owner and the third person, who

[1] Campbell v. Stakes, 2 Wend. R., 137; Cary v. Hotailing, 1 Hill R., 311; Hartop v. Hoar, 1 Wils., 8; 2 Str. 1187, S. C.

[2] Ross v. The People, 5 Hill R., 294.

[3] The People v. Anderson, 14 John. R., 295; The People v. McGarren, 17 Wend. R., 460.

[4] 2 East P. C., 553.

[5] Rex v. Harvey, 2 East P. C., 669, 671, 672. 673.

has purchased the property *bona fide*, for a valuable consideration from him who acquired it by fraud.[1] The distinction is between the taking of chattels feloniously, and acquiring them by means of a purchase fraudulently obtained. In the latter case, one who buys of the purchaser, in possession, without notice of the fraud, acquires the title; not so in the case of stolen goods.

Possession of property obtained by fraud, amounts to a tortious taking, and is regarded in law as a trespass; but in order to constitute the crime of larceny, such taking must be accompanied with the intent to steal.[2] As where one hires or borrows a horse on pretence of taking a journey; but in truth with intent to steal him, this is larceny. So where a carrier severs part of the goods from the rest, with intent to convert them to his own use, he is guilty of larceny; for, say the books, he is as much guilty of trespass against the virtual possession of the owner, by such second taking, as if the act had been done by a mere stranger.[3]

The general doctrine is that the bailee who comes fairly and lawfully into the possession of chattels, is not answerable criminally for his subsequent conversion of them. It is a question of fact, whether he takes the property *animo furandi*, which must be determined by a jury. Thus, the finder of personal property may or may not be guilty of larceny, by appropriating it to his own use. If he know the owner, and appropriates it, he is guilty;[4] but if he neither know, nor have the means of knowing who the owner is, he is not guility of the crime, though he appropriates the property.[5] To make the act of appropriation a crime, it must be shown that the finder takes up the goods, with a felonious intention of converting them to his own use. This may be proved by his concealing them, or omitting to perform his duty in seeking for the owner.[6]

[1] Mowry v. Walsh, 8 Cowen R., 238; Root v. French, 13 Wend., 570.

[2] 2 East C. L., 693.

[3] 2 East C. L., 554.

[4] The State v. Weston, 9 Conn. R., 527.

[5] The People v. Anderson, 14 John. R., 295; The People v. McGarren, 17 Wend. R., 460.

[6] 2 Russell on Crimes, 100, 103.

Who to bear expenses of the Loan.

Under the Code of Louisiana, if, in order to the use of the thing lent, the borrower be compelled to go to some expense, he has no right to be reimbursed by the lender. But if, during the loan, the borrower is obliged for the preservation of the thing, to go to some extraordinary expense necessary and so urgent that he cannot give notice of the same to the lender, the lender is held bound to reimburse him for the same.[1]

Our law is probably not much different from the civil code in this respect. Ordinary expenses, as a matter of course, are to be borne by the borrower.[2] This is but a just inference from the nature of the contract, so just and evident that the question does not seem to have arisen under the common law. It is assumed that the borrower of chattels, whether cattle or slaves, takes upon himself the burden of keeping and taking care of them; for this is necessary to the use of the loan. But if extraordinary expenses are incurred, such as were not foreseen by the parties to the loan, Mr. Justice Story expresses the opinion that the lender would be answerable for them; as if, in the loan of a carriage, the borrower should be compelled to go to the expense of procuring a new wheel, in place of one that had failed.[3] For expenses of this kind, under the civil code, the borrower had a lien upon the chattels. But it may well be doubted whether at common law, in a case of casualty, a new contract would be implied, with authority to the borrower to incur unusual expenses to be charged on the lender; and it is certain that he would not thereby acquire a lien upon the borrowed chattel, unless a new contract is presumed.[4] Bailees for hire, who by their labor and skill have imparted additional value to the goods bailed, have a lien for their reasonable charges; but other bailees have no such lien, and there does not appear to be any foundation for one

[1] Code of Louisiana, art. 2875, 2879.

[2] Story on Bailm., § 256.

[3] Story on Bailm., § 273, 274.

[4] Grinnell v. Cook, 3 Hill R., 485; Nicholson v. Chapman, 2 H. Black. R., 254.

in this case, even if it be allowed that the borrower has the authority to bestow work, labor or expense upon the thing lent.

There being no special agreement with reference to such extraordinary expenses, the borrower's authority to incur them, if any exists, must be a pure implication of law, superadded to his implied undertaking to exercise the greatest care and diligence in the preservation of the property loaned. This would amount to a degree of forecast, in providing for its safety, very uncommon, if not extravagant; instead of which, all implied stipulations are such as the parties are presumed to have actually contemplated. The civil law, which gives such authority and a lien for such expenses when incurred, is more specific and enters into nicer details, without, we apprehend, arriving at more substantial equity than is secured to the parties under the severer principles of the common law.

Care exacted of the Borrower.

We have already mentioned incidentally, in speaking of the elements of the contract of loan, that the borrower is bound to exercise the greatest care and diligence in preserving the borrowed chattels.[1] He is bound to act with all the prudence which the most careful and vigilant men take in their own affairs; and he is responsible for even slight negligence, whereby the property is lost or injured.[2] The omission of the most exact and scrupulous caution, is a culpable neglect in the borrower. In case of loss, the law casts the burden of proof upon him, to show that it did not occur through any fault or neglect of his, either directly or remotely. Though the proximate cause of loss be the wrongful act of a third person, he is liable, if it appear that his own imprudence contributed to create or enhance the peril.[3] He must show that he has done nothing to increase

[1] 2 Ld. Raym., 915.

[2] Jones on Bailm., 65, 66; Scranton v. Baxter, 4 Sand. R., 5.

[3] Jones on Bailm., 66; Story on Bailm., § 237, 238; Vaughan v. Menlove, 3 Bing. N. C., 468.

the danger through his want of caution, nor omitted anything whereby it could have been avoided by the exercise of vigilant prudence; and he is responsible for even the slightest neglect.

Lord Holt, in Coggs v. Bernard, states the doctrine on this point thus: The borrower is bound to the strictest care and diligence to keep the goods, so as to restore them back again to the lender, because the bailee has a benefit by the use of them, so as if the bailee be guilty of the least neglect, he will be answerable.[1] It is to be noticed that he states the liability of the bailee for hire, in terms quite as strong, holding that he also is bound to the utmost diligence, such as the most diligent father of a family uses. Mr. Justice Blackstone also classes these two kinds of bailment together, and describes them in nearly the same words, but evidently without any intention of stating accurately the degree of care demanded in each. Sir William Jones notices this similarity of language, used in reference to contracts quite dissimilar, and contends that Chief Justice Holt was misled by Bracton, on whose authority he relied; that the language of Bracton is copied exactly from Justinian; that Justinian states in the proem to his Institutes, that his decisions in that work were extracted principally from the commentaries of Gaius; and that the epithet *delligentissimus*, which comes down through Bracton, is in fact used by that ancient lawyer, and by him alone, on the subject of hiring.[2] Sir William mentions that Gaius is remarked for writing with energy, and for being fond of using superlatives where all other writers are satisfied with positives; certainly if this view, which is very plausible, be correct, it must be admitted that the energetic Gaius has succeeded in prolonging the emphasis of that word through an unusual lapse of time. It is, however, plain that the use of the word *diligens* in the place of *dilligentissimus*, in the passage quoted, will alter its entire meaning, so as to make it conform to the doctrine as now settled, which demands of the bailee for hire, only

[1] 2 Ld. Raymd., 909, 916. [2] Jones on Bailm., 86, 87.

the ordinary care which diligent men take of their own goods,[1] But the borrower, who alone receives benefit from the loan, is bound to the use of extraordinary care, such as the most diligent and prudent men use in securing their own goods.

The Borrower, when exempt from liability.

It results from the rule of liability we have stated, that in the case of chattels loaned, the owner must abide the loss, if they perish through any accident which a very careful and vigilant man could not have avoided. If they be taken from him by robbery, or stolen out of his possession, notwithstanding his extraordinary care, the borrower is not liable.[2] The law demands no impossibility, and if he uses more than ordinary diligence, he is not chargeable if they be wrested from him by a force which he cannot resist. His implied contract does not bind him to guarranty the lender against the machinations and crimes of third persons; in the case of a borrowed horse, if he put him in his stable, and he is stolen from thence, the borrower is not answerable for him. But if he or his servant leave the stable door open, and the thieves take the opportunity of that, and steal the horse, he is chargeable; because the neglect gave the thieves the occasion to steal the horse.[3]

It seems, where the lender is perfectly acquainted with the character of the borrower, that the latter will be bound only to use reasonable diligence and such skill as he actually possesses.[4] This is assumed to be the rule of law, where the owner knowingly lends a chattel to a raw youth, who cannot be expected to act with skill and circumspection. But the point has not been decided, and it is probable that the usual rule would be held against him, leaving him, where he is an infant, to plead his infancy in answer to the implied contract for extraordinary care.[5] It might be very equitable

[1] Jones on Bailm., 87.
[2] Id., 66.
[3] Per Lord Holt in Coggs v. Bernard, Ld. Raym., 909.
[4] Wilson v. Brett, 11 Meeson and Welsby R., 113; Jones on Bailm., 65.
[5] Campbell v. Stakes, 2 Wend. R., 138.

to presume that the lender, making the loan with a full knowledge of the borrower's want of skill and prudence, was satisfied to demand no higher care than that of which such a person was capable; but it would be very difficult to administer a principle, requiring the investigation of private character as a means of ascertaining the nature of his contract. Besides, the lender, as well as every other man, has a right to the presumption, that he has contracted with a knowledge of, and with reference to, the established and known rule of law;[1] which cannot be known unless it be fixed and invariable. The contrary opinion, expressed by Sir William Jones, and adopted in a qualified form by Mr. Justice Story, is indeed sustained by authorities cited from the civil code, but it does not appear to have acquired the sanction of an adjudication at common law.[2] And, being a question to be settled by inferences and analogies, it is open for discussion.

Though the borrower is not liable for losses occasioned by irresistible force, it is only where he has not put himself in the way of it, by his own rashness, that such an excuse can be rendered.[3] If he ride a borrowed horse by a ruinous house, in manifest danger of falling, and it actually fall and kill the horse, he is, as we have seen, liable; but he is not liable, if the house, being in good condition, fell by the violence of a sudden hurricane. So, he is not responsible for a loss occasioned by the wrongful act of a third person; but he must show that it was in no manner occasioned by his failure to exercise the care and diligence demanded by his contract.[4] He is liable, if he might have prevented or avoided the injury by a provident and thoughtful forecast.

The borrower, in common with other bailees, is not responsible for losses occasioned by the act of God, which, in the legal sense, is one of those extraordinary events against which human intelligence and foresight cannot guard; such

[1] Raymond v. Lent, 14 John. R., 401, 402.
[2] Jones on Bailm., 65; Story on Bailm., § 237; 2 Kent's Comm., 574.
[3] Scranton v. Baxter, 4 Sand. R., 5; Jones on Bailm., 68.
[4] 4 Sand. R., 6, 7.

as storms, lightning, and tempests. A sudden gust, or a sudden failure of the wind, has been adjudged to be the act of God, or *vis divina*.[1] Sir William Jones objects to the use of these terms, in this confined and technical sense, since in some instances it borders even upon profaneness; and he suggests that it would be quite as convenient and perspicuous to adopt the words *inevitable accident*, to express the same idea.[2] But these words, used in their ordinary and popular signification, do not convey exactly the same meaning. The act of God, in a legal sense, means something in opposition to the act of man; if it be the result of human means, though inevitable, it is not the act of God.[3] The wild career of a mob may be unforeseen, irresistible, and so far as the bailee is concerned, its acts may prove the cause of loss by inevitable accident; but this is not regarded in law as an instance of loss by the act of God.[4] So, it has been adjudged that a fire, breaking out casually, not kindled by lightning, is not in the legal sense an act of God, though it burn with inextinguishable violence.[5] The act of God, says Lord Mansfield, in Trent Navigation v. Wood, is a natural necessity, and inevitably such, as winds and storms:[6] it denotes natural accidents, such as lightning, earthquake and tempest; and not accidents arising from the fault or fraud, or negligence of man. It must be something that arises independent of human agency, and which is inevitable and irresistible; but it need not be, properly speaking, an accident; since the freezing of our canals and rivers has been held an intervention of the *vis major*,[7] that will excuse the delay of a common carrier by water. The perils of the sea, and of lakes and rivers, include other dangers than those which

[1] Aimes v. Stevens, 1 Str., 128; Colt v. M'Mecken, 6 John. R., 160.
[2] Jones on Bailm., 105; Story on Bailm., § 489.
[3] McArthur v. Sears, 21 Wend. R., 196,
[4] 1 Term R., 34.
[5] Forward v. Pittard, 1 Term R., 27.
[6] 3 Esp. R., 127.
[7] Bowman v. Teal, 23 Wend., 306, 310.

arise from the acts of God, and are very generally insured against in marine policies.[1]

It is to be observed that the bailee cannot excuse himself by alleging an act of God, where it appears that the loss was occasioned in part by his own negligence, and might have been prevented by human foresight and proper care.[2]

From what has been said it is apparent that there are many cases of loss by accident, besides those which occur from the act of God, for which the borrower is not responsible. He would not be liable for losses caused by a riot, without any neglect on his part; nor for borrowed chattels destroyed by fire, there being no imputation against him of any want of care. Mr. Justice Cowen, in illustrating the difference between an inevitable accident and the act of God, mentions the custom that formerly prevailed on certain remote coasts, where the inhabitants, accustomed to plunder wrecked vessels, sometimes resorted to the expedient of luring benighted mariners by false lights to a rocky shore. Though the stranding of a vessel, in such a case, would not be pronounced an act of God, it is certain that no bailee, except the common carrier, would be held answerable for a loss of goods caused by such inhuman fraud.[3]

Sir William Jones adopts an illustration from the civil law, to the effect that the borrower may be chargeable for *inevitable mischance*, even where he has not so stipulated by express agreement.[4] For example, if the house of Caius be in flames, and he, being able to secure one thing only, save an urn of his own in preference to the silver ewer which he he has borrowed of Titius, he shall make the lender a compensation for the loss; especially if the ewer be the more valuable, and would consequently have been preferred had he been the owner of them both; even if his urn be more

[1] Gordon v. Buchanan, 5 Yerg., 71; Turney v. Wilson, 7 id., 340; Johnson v. Friar, 4 id., 48.

[2] 6 John. R., 168, per Chief Justice Kent, in Colt v. McMecken, and 3 Esp. N. P., 127.

[3] 21 Wend. R., 198.

[4] Jones on Bailm., 69, 70; Story on Bailm., § 245; 2 Kent's Comm., 575.

precious, he must either leave it and bring away the borrowed vessel, or pay Titius the value of that which is lost; unless the alarm was so sudden, and the fire so violent, that no deliberation or selection could be justly expected, and Caius had time only to snatch up the first utensil that presented itself.

Chancellor Kent agrees that if the borrower in this case saves his own goods, and is not able to save the articles borrowed without abandoning his own, he must pay for the loss, because he uses less care of the articles borrowed than of his own property, and gives the preference to his own.[1] But he raises the question, if the borrower's goods are more valuable than those borrowed, and both cannot be saved, whether he is bound in that case to prefer the less valuable borrowed chattels? He answers the question by stating the conclusions of Pothier, that he is liable, without expressing any opinion of his own. Mr. Justice Story, whose commentaries on the law of bailments are so much enriched for the scholar by his learning, and the illustrations he constantly draws from the civil and foreign codes, discusses the point at considerable length, and maintains that the borrower upon principle ought not to be held liable in such a case.[2] It is certainly a very nice and curious question; but as it has never yet arisen at common law, we may safely say that it is more interesting and speculative than practical.

The borrower's liability is to be ascertained in all cases by referring directly to his express or implied contract, to take the utmost care of the goods loaned. Any failure in diligence or want of the prudence and care demanded by his contract, will render him liable; the principle is plain and general; and its application to the facts, as developed in each particular case, being a matter to be left to the jury, it can hardly be important to determine, whether proof that the borrower has saved his own very valuable goods from loss in preference to those bailed to him of much less value, where he could not save them both, would be held evidence

[1] Code Napoleon, art. 1882.

[2] Story on Bailm., § 245 to 251; 2 Kent's Comm., 575.

of due care under the contract. There can be, from the nature of the case supposed, no time for deliberation; and it would seem that the bailee should be held excusable for acting on the impulse of the moment, to seize and save the most valuable article first; and that such an act should not be regarded as evidence of a want of proper care of the less valuable borrowed article.

The borrower is not liable for losses occasioned by irresistible force, of any kind, occurring without any fault of his. He is not responsible for property destroyed by public enemies in time of war, by hostile incursions, or by an act of piracy committed on the high seas. Robbery and depredation upon the high seas constitute the crime of piracy, which is an offence against the universal law of society; a pirate being, according to Sir Edward Coke, *hostis humani generis*, the enemy of the human race.[1] In all these instances, however, of loss by irresistible force, in order to excuse the borrower, it must be made to appear that he has not been wanting in the prudence and foresight required of him by his contract;[2] it must be shown that he has not, through his own oversight and negligence, exposed the property to the peril of the loss, for which he seeks to excuse himself. If his imprudence has induced the train of circumstances, producing the loss, as if he has ridden a borrowed horse in the night time over a road infested with robbers, or too near the advanced guard of a hostile army, and the horse be killed or taken from him, he is responsible, because he has himself contributed to the result.[3] It forms no excuse for him to say that the force was irresistible, where it is apparent that it might have been avoided by the exercise of proper vigilance.

The borrower for an indefinite period, like the depositary, is liable for all casualties after a legal demand has been made upon him for a restitution of the chattels bailed.[4] Indeed, a

[1] U. States v. Palmer, 3 Wheat., 610; The Marianna Flora, 11 Wheat., 1.
[2] Jones on Bailm., 68.
[3] 4 Sand. R., 5.
[4] Jones on Bailm., 70, 71.

refusal, in such a case, to make restoration after a legal demand made, will constitute a conversion of the property, which will render him liable for its value. The borrower, not having made any special contract for the use of the loan for any definite length of time, clearly cannot stand in any better condition after a demand made, than the depositary of goods without reward; and we have seen that he is liable in all events, and may be recovered against on the ground of the conversion, evidenced by his refusal to restore the goods.[1] The breach of his promise to restore the goods is sufficient evidence of a conversion; and a demand and refusal will render him liable for them, where there exists a general obligation to redeliver on demand. But the owner, if he so elect, may pursue the property and demand its restitution notwithstanding the act of conversion;[2] and this course is always preferable where there is any doubt as to the pecuniary responsibility of the bailee. The act of conversion by the bailee, or appropriating the property to his own use, may be proved and taken advantage of by the owner, so as to entitle him to recover its value; but the bailee will not be permitted to prove, or take any benefit from this, his wrongful act, in appropriating borrowed chattels. A stranger, however, who has purchased the property of the bailee *bona fide*, may prove acts of ownership, by the borrower, over the property, constituting a conversion, known to the lender.[3] Because if he be induced to purchase by such acts, amounting to, or accompanying an express declaration, that the borrower was the owner of the property, the lender shall not be permitted to assert the contrary; he is estopped after that, from asserting even the truth to the injury of the party who has acted upon his admission.[4] This is the doctrine of an *estoppel in pais*.

[1] Jones on Bailm., 51; Durell v. Mosher, 8 John. R., 445; Everet v. Coffin, 6 Wend. R., 603; Mitchell v. Williams, 4 Hill R., 13; ante p. 83, 87, 92.

[2] Code of Procedure, § 206 to 217.

[3] McMahon v. Sloan, 12 Penn. State R., 229.

[4] Dezell v. Odell, 3 Hill R., 215; Petrie v. Feeter, 21 Wend. R., 172; Foster v. Newland, 21 Wend., 94; Watson's exrs. v. M'Laren, 19 Wend., 557.

In a loan for use, it follows, from the nature of the contract, that the borrower is not liable for the ordinary wear, decay or depreciation of the thing loaned, provided he has used it in a discreet and careful manner. If it be made worse by the effects of the use alone for which it was borrowed, and without any fault on the part of the borrower, he is evidently not answerable for the same, since the very object of the loan is its use.[1] But if it be loaned for one purpose and used for another, he is, as we have seen, liable for losses by any casualty whatever;[2] this is even the case in a bailment for hire; and the rule is enforced still more strictly as against the borrower.

The bailee of chattels loaned, is bound to use them strictly in the manner contemplated in the contract of loan, and where it is made for a time certain, to return them at the expiration of the period agreed upon. If in the meantime they perish, are injured, or destroyed by the force, crime or fraud of any third person, without any fault or neglect on his part, the bailee is not liable. His care must be extended to the protection of the property against all dangers to which it may be exposed; and he must guard it with the strictest vigilance against ordinary accidents, and the chances of loss by theft, robbery and trespass.[3]

Valued Loans.

The civilians discussed and were divided in opinion upon the question, whether in the case of a valued loan, or where the goods lent are estimated at a certain price, the borrower must be considered as bound in all events to restore either the things lent, or the value of them so fixed.[4] Under our law, the question would be solved by a fair interpretation of the terms of the contract; the mere fact of putting an estimate upon the value of the property, would not imply an undertaking to restore it at all events, or to pay the lender its

[1] Code of Louisiana, Art. 2873.
[2] Jones on Bailm., 69; Wheelock v. Wheelright, 5 Mass. R., 104,
[3] 4 Sand. R., 5; Jones on Bailm., 68, 69; Coggs v. Bernard, 2 Ld. Raym., 909.
[4] Jones on Bailm., 71.

price. But if from the terms of the agreement, it can be fairly inferred that the parties to it, intended that the borrower should take upon himself every hazard, he will be held to answer for the property. To this effect are the illustrations put by Sir William Jones: "If William says to Paul alternatively, 'I promise on my return to Oxford, either to restore your horse or to pay you thirty guineas, he must in all events perform one part of this disjunctive obligation;' but if Paul had only said, 'the horse which I lend you for this journey is fairly worth thirty guineas,' no more could be implied from these words, than a design of preventing any future difficulty about the price, if the horse should be killed or injured through an omission of that extraordinary diligence which the nature of the contract required."

Under the Code of Louisiana, if the thing bailed has been valued at the time of lending it, the loss which results even by chance, is chargeable to the borrower, unless there has been a contrary agreement.[1] The rule with us is directly the reverse; he is not chargeable unless he has made himself so by an unequivocal contract.[2]

But if we consider that the parties contract with a knowledge of the principle, that a valued loan is to be uniformly regarded as charging the borrower with a return of the loan, or a payment of its value at all events, the difference between one rule or the other will appear very slight. In one case, the law being known, enters into and forms part of the contract without any express reference being made to it; in the other, there being no such presumption of liability to overcome, the parties stipulate with a knowledge that the agreement between them, will be precisely what they make it;[3] and in both, the contract is made with a tacit reference to the existing law.

At common law, therefore, the placing of a value or price upon the articles loaned, does not enhance the obligation of the borrower, but serves merely to fix the amount of recovery

[1] Code of Louisiana, art. 2871.
[2] Jones on Bailm., 71.
[3] Story on Bailm., § 253.

in case of a loss, for which the bailee is responsible. It is a mere agreement as to the value of the thing loaned, which leaves the question of liability to be established by inference, or by proof that the borrower has been guilty of some neglect, causing, inducing, or occasioning the loss.

Burden of Proof.

Under the contract of loan, we have assumed all along, that where the goods borrowed are lost, the burden of proving that the loss did not occur through any neglect, rests upon the borrower. This was the rule of the civil code, and it is so with us.[1] It is enough, in the first instance, for the lender to show that the borrower has not returned the lent chattels, at the expiration of the time for which they were lent; or if no time be specified, that he has neglected to return them after a demand made.[2] If it be shown that he has failed to return them according to promise, he is *prima facie* liable; and the burden will then rest upon him, of showing a loss without any fault of his.[3] The initiatory and *prima facie* proof must in each case be shaped to meet the pleadings. If the action be in the nature of trover, alleging a wrongful detention or conversion of the goods bailed, the plaintiff begins by proving that the defendant had the goods on a contract of loan, and that he has not returned them as he promised to do; or, where there is no express promise, that he has neglected to return them after having received the use for which they were loaned, or that he has failed to return them on demand. The burden of proof is then transferred to the defendant, who must show that the goods were lost or destroyed, or stolen, notwithstanding his extraordinary care.[4]

As the plaintiff must allege in his complaint facts constituting a cause of action, so it is necessary that he should

[1] Story on Bailm., § 66; 4 Sand. R., 5, Scranton v. Baxter.
[2] Lockwood v. Bull, 1 Cowen R., 330; Mitchell v. Williams, 4 Hill R., 13.
[3] Duvel v. Mosher, 8 John. R., 445.
[4] 1 Term R., 33.

support his allegations by proof;[1] but the amount and kind of proof demanded will depend very much upon the presumptions of law arising out of the circumstances and relations existing between the parties. It may be said, in general, that the burden of proof rests upon the plaintiff to prove the facts, which it is necessary for him to aver in order to maintain his action; and that the defendant must establish affirmatively whatever new matter of defence he alleges in his answer.[2] Sometimes the *onus probandi* passes from side to side several times in the trial of a single cause. An action against the bailee of goods, received to keep without reward, may illustrate this frequent shifting of the burden of proof; the depositor alleges a conversion of the property, and proves that the bailee has refused to redeliver on demand; and then the onus of accounting for the default lies with the bailee, the presumption being that he has converted the goods to his own use; but if he then take up the case and show them lost, the law immediately raises the presumption in his favor that the loss did not occur through his negligence, and thus again shifts the burden of proof upon the bailor, to show that the loss occurred through the neglect of the bailee. The law does not intend negligence; it is a fact to be proved by the party asserting it as the basis of his right of recovery.[3]

A similar rule applies to the bailee under a contract of mandate. If the mandatary is shown to have received money to deliver to another, there is an implied contract that he will deliver it, or account for it within a reasonable time; and if he neglect to do so, it is enough, it seems, for the mandator in the first instance to show the delivery and this neglect; the onus is then cast upon the bailee to show such a loss as will excuse him.[4] But even in this case, if the plaintiff in his complaint alleges a loss of the money through the bailee's neglect, he must conform his proof to his pleadings and prove the neglect which he has averred.[5] Such

[1] Code of Procedure, § 142; Beach v. Vandewater, 1 Sand. R., 265.
[2] Hollister v. Bender, 1 Hill, 150.
[3] 2 Salk., 655.
[4] Graves v. Ticknor, 6 N. Hamp., 537.
[5] Beardsley v. Richardson, 11 Wend., 25.

proof need not, however, go to the extent of showing an actual loss through the bailee's negligence; he may show a demand and refusal to deliver, and that will cast upon the defendant the burden of accounting for the money.

Without doubt the lender may, in his pleadings, assume the onus of proving that the borrower suffered the thing lent to be lost or injured by his negligence. But this is not necessary; he may allege the lending of the goods for a specific use, to be returned at a given time, and the bailee's neglect to restore them. By proving this allegation on the trial, he will cast the burden of accounting for the property on the bailee.[1]

Restitution.

It results manifestly from the nature of the contract of loan that the borrower is bound to restore the lent chattel after he has received its proper use.[2] Under the civil law, the lender cannot take back the thing lent till after the time agreed on; or if no agreement has been entered into in that respect, not until after it has been employed to the use for which it was borrowed.[3] At common law, Mr. Justice Story assumes it to be settled, that the lender has a strict legal right to terminate the contract of loan whenever he pleases; but he suggests that if he does so unreasonably, so as to occasion injury or loss to the borrower, that the latter may have in some cases a suit for his damages.[4] There is something somewhat inconsistent in this legal proposition, since the enforcement of a strict right, however harshly it may affect others, cannot be complained of as an infringement upon another and conflicting right. The law cannot logically recognize in one man the right to inflict an injury upon another, for which it affords a recovery in the shape of damages; because damages are given only where there has been some breach of a legal duty.[5] And there is no such

[1] Duvell v. Mosher, 8 John. R., 445.
[2] Jones on Bailm., 65, 66, 67, 71; 2 Kent's Comm., 574.
[3] Code of Louisiana, art. 2877; Story on Bailm., § 257.
[4] Story on Bailm., § 258.
[5] Blanchard v. Ely, 21 Wend., 342.

breach where the lender confines himself to the enforcement of his legal rights. A recoupment of damages is sometimes allowed for the purpose of avoiding circuity of action;[1] but it is permitted only in a case where the defendant shows that the plaintiff has violated some stipulation contained in the contract on which the suit is founded; and it implies that the defendant has a right of action against the plaintiff growing out of the same contract.[2]

If, as Mr. Justice Story suggests, the borrower may, where the object of the loan has been but partly accomplished, retain the subject of the bailment and recoupe his damages in defence of an action brought against him, it is evident that this can be done only on the ground that the lender has violated some stipulation, express or implied in the contract of loan. If there be a stipulation on the part of the lender, either express or raised by implication of law, that the borrower shall be permitted to retain the loan until the object of the bailment shall have been accomplished, it follows that the borrower acquires a legal right in the thing loaned.[3] The right of recoupment cannot exist, unless the lender has violated some stipulation contained in the contract, or growing out of the transaction.[4] And it is difficult to perceive what stipulation he enters into, unless it be to permit the borrower to use the thing lent, for the time and purposes contemplated.

The lender may, as we have seen, terminate a general loan for use, at his pleasure.[5] For in such a loan he grants simply the custody of the chattels lent, with the authority to use them, and by implication retains the right to revoke the authority and reclaim them at any time. The possession in fact remains with the lender, so that under our old practice he might maintain the action of trespass against a

[1] McAllister v. Reab, 4 Wend., 483.

[2] Ives v. Van Epps, 22 Wend. R., 155; Reab v. McAllister, 8 Wend. R., 109; Hills v. Bannister, 8 Cow. R., 31; Batterman v. Pierce, 3 Hill R., 171; Van Epps v. Harrison, 5 Hill R., 63.

[3] Bac. Abr., C., p. 374.

[4] Butler v. Rose, 5 Hill R., 76.

[5] Orser v. Storms, 9 Cowen R., 687.

third person who had seized the property; which could be maintained only where the plaintiff had either the actual or constructive possession of the goods. And he was constructively in possession whenever he had the immediate right to reduce them into his actual possession.[1]

It is assumed in Bacon's Abridgement, already quoted, that the borrower, for a specific use or time, acquires a special property in the thing lent, which cannot be divested until he has had the use for which the loan was made, or until the time has expired. But there do not seem to be any recent decisions precisely in point. Under the Code of Louisiana, if, before the time for which the loan was made has expired, the lender be in an urgent and unforeseen need of the borrowed article, the judge may, according to circumstances, direct its return.[2] At common law, the question involves the nature and extent of the contract. The authorities quoted by Mr. Justice Story in support of the proposition we have mentioned, that the lender may terminate the loan at pleasure, many of them refer to loans for an indefinite time; and others to the right to countermand an authority given to an agent. If the borrower acquires, with the custody of the borrowed article, only the authority to use, there is no doubt that the authority may be revoked.[3] But if we assume that he acquires a legal right to the use of the thing loaned for the time contemplated, or for the purpose agreed upon, the grant is no longer that of a mere authority, revocable at pleasure; it becomes an authority coupled with an interest in the bailee. Such an authority cannot be revoked without the consent of the person to whom it is given; because it is given for a consideration valid in law.[4]

A mere power or authority reposed in the bailee under the contract of loan, may be terminated at the will of the

[1] 9 Cowen R., 687.

[2] Article 2878.

[3] Viner's Abridg. Countermand A, and Bailment D; Sheppard's Epitome Countermand; Taylor v. Linday, 9 East R., 49; Cro. Jac., 687; 1 Stra. R., 165; 1 Dane Abr., ch. 17, art. 4, § 10.

[4] 2 Kent's Comm., 643, 644.

lender; or withdrawn, like the authority of an agent.[1] In the case of a loan for an indefinite time, a refusal by the borrower to return the goods loaned on demand, will render him liable for their value; for this amounts to a conversion of them. If a legal demand has been made for their return, the bailee must answer for any casuality that happens after the demand; unless in cases where it may be strongly presumed that the same accident would have befallen the thing bailed, even if it had been restored at the proper time.[2] This liability, doubtless, may be enforced notwithstanding the lender may not choose to bring his action to recover its value, as for a conversion of the property. But it is the usual practice to bring the suit against the bailee for the goods bailed, and prove the act of conversion as the mode of fixing the amount of the recovery.[3]

The place where the borrowed goods are to be restored in the absence of any express agreement in that respect, will depend upon the circumstances and nature of the contract. The borrower must return them to the lender, ordinarily at the place from which he received them; but the lender may designate the place where they shall be received. The borrower, in fact, contracts to redeliver the goods bailed; and if no place be agreed upon, the bailor may name the place.[4] The bailee, no place being appointed for the delivery, must, it seems, seek the lender and learn at what place he will receive them.[5] This has been expressly adjudged to be the rule of law in respect to contracts for the delivery of specific articles; but the rule is subject to some qualifications, depending upon the nature, value and bulk of the articles to be delivered. Jewelry, for instance, should be returned to the lender in person, or to his authorized agent; while other portable articles, such as horses or cattle should be delivered

[1] 2 Kent's Comm., 643 – 647.
[2] Jones on Bailm., 71.
[3] Baker v. Wheeler, 8 Wend., 505; Dillenback v. Jerome, 7 Cowen's R., 294.
[4] Co. Litt., 210 b.; Aldrich v. Albee, 1 Greenleaf, R., 120.
[5] Bixby v. Whitney, 5 Greenleaf R., 192.

at the place where the collateral circumstances show that the lender intended to receive them.[1]

The Code of Louisiana provides that if the contract does not specify the place where the article bailed must be restored, that it shall be restored at the place where the bailment was made.[2] Though the place be not named, if it may be inferred from the terms of the contract, or from the circumstances attending it, the delivery must be made at that place. The borrower assumes the obligation to redeliver, which is as imperative upon him as if he had entered into an agreement to pay a fixed amount in specific articles. The party bound to render a service or make a payment by a given day, must seek the party to whom the debt or duty is due.[3] Is the place of performing the contract changed by substituting a commodity for money? The implied place of performance is sometimes changed by the nature of the articles to be delivered. If a merchant or manufacturer engages to pay on demand in the articles of his trade, and no place is specified in the contract, the store of the merchant or the workshop, or place of deposit of the fabrics of the manufacturer, is the place where payment must be demanded before an action accrues for the non-performance of the contract;[4] because, from the peculiar circumstances and course of business of the promissors, the inference is that the parties intended that the articles should be delivered at the promissor's usual place of making and delivering the articles sold by them. The engagement is that the articles shall be delivered *on demand*, and this seems to imply that the creditor must go to the debtor to make the demand, before the latter can be in default.

But where a note of hand is given, payable at a time fixed, in cattle, grain or other portable articles, and no place of payment is designated in the note, the creditor's place of

[1] 2 Kent's Comm., 507; Chipman on Contracts, 25, 26, 27; Story on Bailm., § 117.

[2] Art. 2925.

[3] Goodwin v. Holbrook, 4 Wend. R., 377.

[4] Chip. on Cont., 28, 9.

residence is the place of payment; for in this case there is nothing to rebut the usual presumption that the debtor or party bound, must seek his creditor and discharge his obligation within the time limited.[1] In like manner, the borrower is under an obligation to return the borrowed articles to the lender, and if the time and not the place of the return be fixed, he must take them to the lender's residence or place of business; for this obligation to redeliver, is in substance a debt or duty due to the lender.

There is some diversity in the decisions in regard to the place where a contract for the delivery of specific articles shall be performed; but this diversity arises out of the difference of circumstances attending the contract.[2] Thus, an agreement made at the residence of the debtor, payable in farm produce at the market price, may be performed at the place where it is made; and there being no time fixed for the payment, it is held that no action will lie until after a demand is made at the farm of the debtor. The want of time in such a contract renders it payable on demand; and the fact, that it is payable in farm produce, draws after it the inference that the farm is the place of payment.[3]

It is held in Kentucky, that on contracts for the delivery of property, where no place is expressed, the usual residence of the obligor is the place of performance; and that where the property is to be delivered on request, a special request at the obligor's residence must be averred.[4] The action was on a contract for the payment of two hundred dollars, in a negro, upon request, and it was adjudged on demurrer that the plaintiff must aver in his declaration, a demand of the chattel at the residence of the vendor, or show circumstances justifying a departure. The law judges the place according

[1] 4 Wend., R., 377.

[2] Lobdell v. Hopkins, 5 Cowen R., 516; Chambers v. Winn, Prin. Dec. Kentucky, 192; Wilmouth v. Patton, 2 Bibb's Kentucky Rep., 280; Mason v. Briggs, 16 Mass. R., 453.

[3] Smith v. Leavensworth, 1 Root, 209; Bach v. Owen, 5 Term R., 409; Chandler v. Windship, 6 Mass. R., 310; Benners v. Executors of Howard, Tayl. N. C., 149.

[4] Wilmouth v. Patton, 2 Bibb R., 280.

to the nature and subject matter of the thing to be performed; presuming, in such a case, that the contract is to be executed at the place where it is made.

In construing contracts of this nature, courts endeavor to carry into effect the intention of the parties, which may very often be inferred from the subject and purpose of the contract, as well as from its language. In an action for articles delivered to a bailee to be redelivered when called for, the bailee being absent from the commonwealth, a demand was made of his wife at the place of his residence; and it was held good, on the ground that one who makes a contract to deliver specific articles on demand should be always ready at his dwelling-house or place of business.[1] This is clearly much more reasonable than to permit a demand to be made upon him personally for them, since he cannot be expected to carry the goods about with him. The reason here is the same as that which requires a due bill without time or place, given by a merchant for goods, or a mechanic for work, to be demanded of the merchant at his store, or of the mechanic at his shop.[2]

There is a perfect analogy between the contract to pay a fixed sum in specific articles and the undertaking of the borrower to redeliver the goods bailed to him. In respect to the time, place and manner of delivery, the obligation is the same, unless, indeed, the borrower is bound more strongly to seek the lender and learn his pleasure as to the place where he will receive the borrowed articles. The farmer who has given his note, payable in farm produce, may deliver the produce and pay the note at the place where it is made. But one who contracts to pay a given sum in salt, on or before a day named, must go to the residence of his creditor and make his payment there.[3] So, also, no doubt the borrower, who has promised to return the bailed goods within a fixed time, must bring them to the lender, either at his residence or place of business, depending upon the

[1] Mason v. Briggs, 16 Mass. R., 453; Fanchot v. Leash, 5 Cow. R., 506.
[2] Lobdell v Hopkins, 5 Cowen R., 516; Woodcock v. Bennett, 1 Cow. R., 711
[3] Goodwin v. Holbrook, 4 Wend. R., 377.

circumstances and the subject matter of the contract. If he fail to fulfill the promise, he is liable for the value of the property.[1] The duty he owes to the lender to return the property, involves an obligation as strong and imperative as that which the debtor owes to his creditor; he must not wait for a demand unless the loan is made for an indefinite time; and even then, he must make the return at the place designated by the lender. If he retains the goods for a longer time than has been agreed on, he is liable for any loss that may happen;[2] because he is liable as for a conversion of the property. And, of course, whenever the bailee has been guilty of a neglect in the return which amounts to an act of conversion, he is liable for all subsequent losses, even by accident. It is scarcely necessary to say that the bailee is equally responsible for the return of things accessory to the principal thing bailed, such as chains and seals appended to a borrowed watch, the increase of animals loaned, or the interest accruing on a lent note.[3]

Where several persons jointly borrow an article, they are bound for it *in solido*;[4] they enter into a joint contract to take care of and return it, which may be enforced against them all jointly, because each is answerable for the acts of the others. But the action should be brought against them all, or against the survivors, if one or more of them be dead. An agreement entered into by several persons is presumed to be a joint contract, unless otherwise expressed.[5]

The loan being precarious and liable to be terminated at the pleasure of the lender, may be revoked in several ways; by a demand that it be returned; by the death of the lender, or by a sale of the thing loaned. Being made for an indefinite time, it may be recalled whenever the lender pleases;[6] for in this case, only an authority to use accompanies the

[1] Durrell v. Mosher, 8 John. R., 445.

[2] Code of Louisiana, art. 2870; Jones on Bailm., 68; Coggs v. Bernard, 2 Ld. Raym., 909, 916.

[3] Jones on Bailm. 66; Story on Bailm., § 260.

[4] Code of Louisiana, art. 2876.

[5] 1 Cowen Trea., 609, 611, 3d ed.

[6] Orser v. Storms, 9 Cowen R., 687; 8 John. R., 432.

article loaned; and in all such cases, there is no doubt the lender retains the right to countermand the trust or authority accompanying the custody. We have already considered this right of countermand; it exists wherever no vested interest has been acquired under the trust. As, where there was a bailment of money, to the use and behoof of a woman, to be delivered to her on the day of her marriage, it was held, that the gift being only executory, the bailor retained the right to countermand the authority at any time before delivery.[1] But where the bailee, or the person for whose benefit the trust is created, acquires a legal interest in the subject of the bailment as against the bailor, the right of countermand is gone. It is then no longer a mere power, which is revocable at pleasure.[2]

In some instances the bailee acquires a right to hold for a time the goods bailed to him. In Rich v. Aldred, Chief Justice Holt holds that if A bails the goods of C to B, and C bring detinue against B for them, B may plead the bailment to him by A to be redelivered to A, and so bring in A as garnishee to interplead with C; and that if A bail goods to C and after give his whole right in them to B, B cannot maintain detinue for them against C, because the special property that C acquires by the bailment is not thereby transferred to B.[3] Mr. Justice Story thinks this case must have been loosely reported, since the bailee cannot stand in any better situation than the person from whom he received the property, and consequently cannot have any right to detain the same where the bailor has none.[4] But it is very possible that if the case had been fully reported, it would have shown a bailment by authority of the owner, so as to confer a legal right on the bailee for a limited time. Ordinarily, however, unless the owner has parted with his goods temporarily, on a valid agreement, he has a right to de-

[1] Lyte et Ux v Perry, Dyer, 49, pl. 7.

[2] Sheppard's Epitome; Taylor v. Landey, 9 East, 49; Rich v. Aldred, 6 Mod. R., 216; Cro. Jac., 687; Viner Abr., D.

[3] 6 Mod. R., 216.

[4] Story on Bailm., § 281.

mand and recover them of the person who has them in his custody.[1]

The loan for consumption, or *mutuum* of the civil law, in which one person delivers to another a certain quantity of things which are consumed by the use, under an agreement by the borrower to return to him as much of the same kind and quality, is regarded at common law as a sale. It was at one time held in this state that the delivery of a quantity of wheat, to be exchanged for flour at the rate of a barrel of flour for every five bushels of wheat, the wheat being mixed with other wheat belonging to the party receiving it, constituted not a sale but a bailment.[2] But the authority of the case in which that decision was made has been overruled; and it is now held that the title to the property passes.[3]

Where goods are lent for a use in which the lender has a common interest with the borrower, as in other bailments reciprocally advantageous, the bailee is responsible for only ordinary negligence, and is liable for their return in the same manner as a bailee for hire; for this is not properly a loan.[4] Agreeably to this principle, it must be decided that where goods are lent for the sole advantage of the lender, the obligations and duty of the borrower must be modified and reduced to the standard of those exacted of a depositary without reward.

To use the illustration given by Sir William Jones, if a passionate lover of music were to lend his own instrument to a player in a concert, merely to augment his pleasure from the performance, and the musician were to play with all due skill and exertion, but were to break or hurt the instrument, without any malice or very culpable negligence, he would not be bound to indemnify the amateur, as he was not in want of the instrument, and had no particular desire to use it.[5] Still, it is held that a person who rides a horse gratui-

[1] Story on Bailm., § 282; Wilson v. Anderton, 1 Barn. and Adolph., 450.

[2] Seymour v. Brown, 19 John. R., 44.

[3] Smith v. Clark, 21 Wend., 83; Hard v. West, 7 Cow. R., 752; Buffum v. Meny, 3 Mason R., 478; Pierce v. Schenck, 3 Hill R., 28.

[4] Jones on Bailm., 72; De Fonclear v. Shottenkirk, 3 John. R., 170.

[5] Jones on Bailm., 73.

tously at the owner's request, for the purpose of showing him for sale, is bound, in doing so, to use such skill as he actually possesses; and that, being a person conversant with and skilled in horses, he is equally liable with a borrower for injury done to the horse while ridden by him.[1]

Transfer of Title by recovery.

Notwithstanding the borrower cannot acquire title to chattels loaned to him, by any act of which he may be guilty, he is, as we have seen, liable for their value whenever he has exercised acts of ownership over them, and the lender elects to bring his action as for a conversion of the property. The owner does not lose his title without his consent, by any alteration of form through which his property may pass; he may seize it in its new shape so long as he can prove the identity of the original materials, as leather made into shoes, cloth into a coat, trees squared into timber, wood converted into coal, logs manufactured into boards, or black salts converted into pearlashes.[2] But if he elects to bring his action in the nature of trover against any person who acquires the custody of his goods by bailment or otherwise, and recovers its value in damages, his title will pass on payment of the judgment entered for the amount of the recovery.[3] A mere recovery does not change the property; there must be an actual satisfaction of the judgment, or payment of the recovery. Taking the defendant on execution and committing him to prison does not work the change of title, for the judgment alone does not bar his right to follow the property until it is made productive in satisfaction to the owner.[4]

[1] Wilson v. Brett, 11 Mees. and Wels. R., 113.

[2] Curtis v. Grant, 7 John. R., 168; 5 id., 348; Babcock v. Gill, 10 John R., 237; Brown v. Sax, 7 Cow. R., 95; Baker v. Wheeler, 8 Wend. R., 505.

[3] Osterhout v. Roberts, 8 Cow. R., 43.

[4] Drake v. Mitchell, 3 East R., 258; Claxton v. Swift, 3 Mod., 86; 2 Show., 484; Livingston v. Bishop, 1 John. R., 290.

CHAPTER V.

PLEDGES OR PAWNS.

Nature of the Contract.

We come, next in order, to consider bailments, mutually beneficial to both the parties to the contract. A pledge is something put in pawn or deposited with another as security for the repayment of money borrowed, or for the performance of some agreement or obligation; it is legally defined to be a bailment of goods by a debtor to his creditor to be kept till the debt is discharged.[1] Lord Holt says: the fourth sort of bailments is when goods or chattels are delivered to another as a pawn, to be security for money borrowed of him by the bailor; and this is called in Latin *vadium*, and in English a pawn or pledge.[2] Chancellor Kent calls it a bailment or delivery of goods by a debtor to his creditor, to be kept till the debt be discharged;[3] and Mr. Justice Story defines it even more comprehensively, as a bailment of personal property, as security for some debt or engagement.[4] It is the *pignori acceptum* of the civil law, being a contract by which a debtor gives something to his creditor as a security for his debt.[5] The term *pignus* was used in the Latin, as the corresponding term, pledge, is used in the English language, in a general as well as a legal sense, so as to include hostages, given as a security for the performance of the stipulations of a treaty, or anything given by way of assuring the discharge of some obligation. The Latin term conveys the idea of

[1] Jones on Bailm., 118.
[2] Coggs v. Bernard, 2 Ld. Raym., 909, 913.
[3] 2 Kent's Comm., 577.
[4] Story on Bailm., § 286.
[5] Code of Louisiana, art. 3100; 2 Kent's Comm., 578; Jones on Bailm., 86.

things given in security by a manual delivery; *Pignus appellatum a pugno, quia res quae pignori dantur, manu traduntur;*[1] and the contract was in the civil law as it is in ours, confined to personal property, including under that term, certainly at common law, negotiable paper and choses in action.[2]

Notes, bonds, stocks, and in general all kinds of personal chattels, may be assigned or delivered in pledge; for the mere delivery of a chattel or chose in action is sufficient.[3] Even a specialty may be assigned for a valuable consideration by a mere delivery, such as bonds, deeds or covenants.[4] The title to the thing delivered in pledge does not pass as it does in the case of a chattel mortgage. The delivery is made as a security for the payment of a debt, or for the performance of some other act; and the party making the delivery retains a power of redemption. In a chattel mortgage the title is conveyed, subject to the condition of a defeasance in case of payment; whilst the title to goods deposited in pledge remains in the person making the deposit, only a special property passing to the pledgee. There is also another distinction between a pledge and a mortgage of personal property; a delivery is essential to a pledge, whilst a mortgage of goods is sometimes valid without delivery.[5]

The earlier writers speak of anything given as a security for debt as a pledge. "A loan, says Glanville, is sometimes made on the security of a pledge, and the pledge may consist of chattels, lands or rents. Sometimes possession is immediately given of the pledge, on receipt of the loan, and sometimes it is not. Sometimes the thing is pledged for a term, and sometimes without. When a chattel is pledged and possession is given, and for a certain term, the creditor is bound to keep the pledge safely, and not to use it to its detriment. If it be agreed that in case the debtor should

[1] Dig., Lib. 50, tit. 16, l. 238.

[2] 2 Kent's Comm., 578; McLean v. Walker, 10 John R., 472.

[3] Prescott v. Hull, 17 John. R., 285.

[4] 4 T. R., 690; 4 Taunt., 326; 13 Mass. R., 304; 15 id., 481; 2 Greenl., 322; 3 id., 346.

[5] Cortelyou v. Lansing, 2 Caines' Cases in Error, 200.

not redeem the pledge at the end of the term, the pledge shall remain with the creditor as his own property, the agreement must be observed. But if there be no such agreement, and there be a fixed time of redemption, and the debtor make delay in payment, the creditor may quicken the redemption by a writ (of which he gives the form), and which requires the debtor, without delay, to redeem the pledge. On return of the writ, if the defendant confessed the pledge, he was commanded to redeem in a reasonable time, and on default the creditor had license to treat the pledge as his own. But if the pledge was made without any particular term, the creditor might demand his debt at any time and the debt being discharged, the creditor was bound to restore the pledge without any deterioration."[1]

This authority establishes two points; first, that where the pledge was not redeemed by the time stipulated, it did not become *ipso facto* the absolute property of the pawnee, but that the pawnee was obliged to take his legal proceeding in order to obtain authority to dispose of the pledge; and, second, that where the pledge was for an indefinite term, the creditor might at any time call upon the debtor to redeem by a similar process of demand.

In a general sense, the mortgaging of lands or personal property, is the giving of them in pledge to secure the payment of a debt. But, in strict language, a mortgage of goods is something more than a pledge;[2] it is a pledge to become an absolute interest, if not redeemed at the specified time. After the condition forfeited, the mortgagee has an absolute interest in the thing mortgaged; whereas a pawnee has but a special property in the goods to detain them for his security.[3] As the law is now well settled, a pledge is a deposit of goods to be redeemed on certain terms, the delivery always accompanying the pledge; while the general title remains in the person making the pledge, a special property passes to the pawnee, who may use the pawn so as not to injure it;

[1] Glanville, Lib. 10, c. 1, p. 59; 1 Reeves, 161, 162.

[2] Brown v. Bement, 8 John. R., 96, 97, 98.

[3] 2 Ves., Jun., 378; 1 Powell on Mort., 3; Cro. Jac., 244; Noy., 137; 1 Atk., 167; Salk., 522.

but the pawnee does not acquire the absolute property on a failure of the pledgor to redeem, unless there be between the parties a special contract to that effect.[1]

Formerly, the mortgage and pledge or pawn of goods seem to have been generally confounded in the books, and it was not until a comparatively recent period that a just discrimiation was made between them. The opinion of Chancellor Kent, in Cortelyou v. Lansing, reported in the second volume of Caine's Cases in Error, though never in fact delivered, contains an interesting and elaborate review of the decisions on this subject, establishing and vindicating the distinction between a mortgage and a pledge of personal chattels. The case was argued and the opinion written by the chancellor, who was at the time one of the justices of the supreme court; a re-argument was then ordered, which for some reason was never brought on, and the cause remained undecided. But the opinion having fallen into the hands of the reporter, was erroneously published, and has been since judicially adopted as good law.[2]

A mortgagee of personal property, upon failure of the mortgagor to perform the condition of the mortgage, acquires an absolute title to the chattel. This is well established to be the legal effect and operation of a mortgage of personal property.[3] When given to secure the payment of money, the mortgage of either real or personal estate is but an accessory or incident to the debt, or to the security which is given as the evidence of the debt. The assignment of the debt or security, passes the interest in the mortgage; for the mortgage so given cannot exist as an independent debt. If by a special agreement it does not accompany the security assigned, it is *ipso facto* extinguished, and ceases to be a subsisting demand.[4] Where a mortgage was given to secure a

[1] Mores v. Conhem, 7 Jac. I, in C. B., Owen, p. 123.

[2] 2 Caine's Cases in Error, 200; Barrow v. Paxton, 5 John. R., 259; McLean v. Walker, 10 John. R., 472.

[3] Brown v. Bement, 8 John. R., 96; Ackley v. Finch, 7 Cowen R., 290; Langdon v. Buel, 9 Wend, R., 80. The mortgagee acquires the legal title only by the forfeiture.

[4] Jackson v. Willard, 4 John. R., 43; Jackson v. Blodget, 5 Cowen R., 202; Martin v. Mowlin, 2 Burr., 979; Green v. Hart, 1 John. R., 581.

note payable to order, and the holder indorsed the note over, and at the same time delivered to the indorsee the mortgage, but made no assignment of it in writing, it was held that the transfer of the note being in writing, the mere delivery of the mortgage security was a sufficient assignment. The debt is the principal, and the security the incident; and the assignment of the principal draws after it the incident.[1]

In like manner, no doubt, the pledgee may assign the debt for which he holds a security in pledge, and transfer by actual delivery his interest in the goods bailed; so that the purchaser will acquire precisely the rights which he possessed, subject to the same obligations.[2]

Requisites of the Contract.

It is of course necessary that the person making a pledge of goods as security for a debt should own them, or at least have the authority to deposit them in pledge. The contract of bailment passes a certain interest or special property in the goods to the pawnee; and the pawnor impliedly stipulates that he possesses the right which he assumes to transfer. To the extent of the interest which he undertakes to convey, he in fact warrants his title as much as does the vendor on an absolute sale.[3] If he undertake to pledge property that belongs to another, without his consent, he cannot afterwards, so long as the owner refrains from claiming it, seek to have it restored until his debt is discharged. So, too, though he is not the owner at the time the pledge is made, if he subsequently acquire the property, by what title soever, his ownership will be deemed to relate back to the time of the contract, and the pledge will stand good.[4] The right of the true owner will not be affected by the pledge, made without his authority, except, perhaps, in the case of negotiable paper, the possession of which is evidence of title; but the person making the pledge will not be permitted to assert his own

[1] Pattison v. Hull, 9 Cowen R., 747, and 1 John. R., 581.
[2] Kemp v. Westbrook, 1 Vesey, 178; Ratcliff v. Vance, 2 Const. Rep. S. C., 239.
[3] Rew v. Barber, 3 Cowen R., 272; Defreeze v. Trumper, 1 John. R., 274.
[4] Code of Louisiana, art. 3109 to 3114.

want of title.[1] The civil and common law agree in holding that an implied warranty is annexed to every sale of personal chattels in respect to the title of the vendor; and the reason of the rule certainly applies to the case where there is a transfer of a special or qualified property.[2]

As we have already seen, the contract of pledge is completed by an actual delivery of the thing pledged.[3] It follows that property in expectancy cannot be the subject of the contract, nor any other interest which is incapable of being delivered.[4] The debtor may give in pledge whatever things belong to him in present posession. But in regard to those things in which he has a property which may be divested, or which is subject to incumbrance, he cannot confer on the creditor, by the pledge, any further rights than he had himself. He pawns the interest which he possesses, subject to the superior right of the incumbrancer, or person who owns the reversionary interest in the subject of the bailment.[5]

There is an exception in favor of bills of exchange and negotiable notes. Thus, if A deposit bills indorsed in blank with B, his banker, to be received when due, and the latter raises money on them, by placing them with C, and afterwards becomes bankrupt, A cannot maintain trover against C for the bills.[6] In respect to negotiable paper, Chief Justice Eyre, in Collins v. Martin, says: "For the purpose of rendering bills of exchange negotiable, the right of property in them passes with the bills. Every holder, with the bills takes the property, and his title is stamped on the bills themselves. The property and the possession are inseparable. This was necessary to render them negotiable; and in this respect they differ essentially from goods, of which the property and possession may be in different persons. The property passing with the possession, it is admit-

[1] Jarvis v. Rogers, 13 Mass. R., 105; 1 Dane Abr., ch. 17, art. 4, § 7, 8.

[2] Black. Comm., 451; 1 John. R., 275.

[3] 2 Caine's Cases in Error, 200.

[4] Code of Louisiana, art. 3103.

[5] Hoar v. Parker, 2 Term R., 376; 4 Camp. R., 121; McCombie v. Davies, 7 East R., 5.

[6] Collins v. Martin, 1 Bos. and Pull., 648.

ted that a banker, who receives indorsed bills from his customer, to be got when due and carried to his account, may discount or sell them; why may he not pledge them? Either is a breach of confidence reposed in him, and he may sell, because the property has been intrusted to him; and he may pledge for the same reason; for he who has the property has a disposing power, and the law has not limited it to be used in any particular manner."

In the case of Coddington v. Bay,[1] it was adjudged, on a lengthened review of the authorities, that a person receiving notes or negotiable paper, in the usual course of trade for a fair and valuable consideration, from an agent or factor, having no authority to transfer them, but without knowledge of that fact, or notice of the fraud, may hold them against the true owner; but that he cannot so hold negotiable paper, simply received by him as security against responsibilities previously incurred. In order to give the bailee or person receiving them the right to hold them as against the true owner, it must be made to appear that he received them for a present consideration; in other words, that he parted with value for them, gave some new credit, sold property, accepted bills or advanced money for them, in the usual course of trade.[2] In the case under consideration, the agent received notes to be remitted to his principal, and passed them over to the defendant as a security against responsibilities previously assumed by him as the agent's indorser, and the defendant had no knowledge that the notes belonged to the plaintiff; but it was held that the notes, not being received in the usual course of trade, nor for a present consideration, the defendant was not entitled to hold them against the true owner.[3] If, on the other hand, the pledgee receive negotiable notes bona fide in the way of business,

[1] Coddington v. Bay, 20 John. R., 637. This case was argued by Messrs. Van Buren, Jones and Emmet in the Court of Errors in 1822, and the opinions were delivered by Chief Justice Spencer, Mr. Justice Woodworth, and Senator Vielie. Negotiable notes come under the general notion of currency and are transferable by delivery; 20 Wend. R., 277.

[2] Buller v. Harrison, Cowp., 565; Clark v. Shee, Cowp., 197, 200.

[3] Colt v. Lesnier, 9 Cowen R., 220; Warner v. Beardsley, 8 Wend. R., 194.

and give money or property in exchange for them, he may vindicate his title against the world.[1] A debt contracted at the time and on the faith of the notes received in pledge, will confer upon the pledgee the right to retain them as a collateral security.

But the general principle, undoubtedly, is that the person making the pledge can convey to the pledgee no greater interest in the thing pledged than he himself possesses. If he have only a lien upon the goods bailed, he may pledge that and nothing more without the consent of the owner.[2] For instance, a factor may deliver the possession of goods, on which he has a lien, to a third person, with notice of the lien, and with a declaration that the transfer is to such person as agent of the factor and for his benefit; but he cannot pledge his principal's goods.[3] A lien is defined to be, the right of one man to retain property in his possession belonging to another, until certain demands of the party in possession are satisfied.[4] But the possession thus essential to the lien need not always be the direct and actual possession of the party; that of his agent, servant or the keeper of a warehouse acting under his authority is also his own, for this as for many other legal purposes. As between the parties to the contract out of which the lien arises, and third persons acquiring rights to the property, a surrender of the possession is a surrender of the lien.[5] But the lien of the master of a vessel on a cargo for freight and charges, may be assigned or delivered in pledge.[6]

The rule is, that a lien is a personal right and cannot be assigned,[7] though the party having a lien upon goods

[1] Miller v. Race, 1 Burr. R., 452; Grant v. Vaughan, 3 Burr. R., 1526; Peacock v. Rhodes, Doug. R., 633; Lawson v. Weston, 4 Esp. N. P., Rep., 56; Bank of St. Albans v. Gilliland, 23 Wend. R., 311; Rogers v. Morton, 12 Wend. R., 484; 14 Wend. R., 575.

[2] Story on Bailm., § 291, 295; 1 Bell Comm., § 412, 4th ed.

[3] Lanssat v. Lippincott, 6 Serg. and Rawle., 386; Urquart v. McIver, 4 John. R., 103.

[4] Hammond v. Barclay, 2 East, 235.

[5] McFarland v. Wheeler, 26 Wend. R., 467.

[6] Everett v. Coffin, 6 Wend. R., 601.

[7] 5 Term R., 606.

may transfer the possession subject to the lien to a third person, who may lawfully hold the property until the lien is paid; but if the transferee sell the goods, the owner is remitted to his original rights, freed from the lien and may bring trover for them.[1] So too, the pawnee may assign his interest, without destroying the original lien, or giving the pawnor a right to reclaim on any other terms than he might before such assignment.[2] So also it has been held, that where the purchaser of personal property delivers it as security to the person who becomes his surety for the purchase money, and he permits the purchaser to use it, this does not destroy the right of the surety to resume the possession of the property for his indemnification.[3]

A delivery is, as we have already mentioned, essential to complete the contract of pledge.[4] In this the pledge differs from a mortgage of goods, which in certain cases is valid without delivery. Where, however, an actual delivery is impracticable, as where logs in a boom are pledged, and shown to the pawnee at the time, the pledge is as effectual as in the case of an actual delivery of property capable of personal possession.[5] Though the mortgagor of goods may sometimes retain possession of them, it seems, he must first deliver them to the mortgagee in order to render the mortgage valid against the creditors of the mortgagor.[6] A delivery and a complete transfer of the title to goods, with a condition of defeasance on the payment of a sum named, becomes an absolute title at law in the mortgagee as soon as the condition is forfeited;[7] but the failure of the pledgee to redeem at the time stipulated, does not work a change of

[1] Nash v. Mosher, 19 Wend. R., 431.

[2] 15 Mass. R., 408; Bullard v. Billings, 2 Verm., 309; Macomber v. Parker, 14 Pick. R., 497; Hunt v. Holton, 13 Pick. R., 216.

[3] Ferguson v. Union Furnace Company, 9 Wend. 345; Hall v. Tuttle, 8 Wend. R., 381.

[4] Cortelyou v. Lansing, 2 Caines' Cas. in Er., 200; Gleason v. Drew, 9 Greenl. 82; Barrow v. Paxton, 5 John. R., 259; Brown v. Bement, 8 John. R., 97.

[5] Jewett v. Warren, 12 Mass. R., 300.

[6] 5 John. R., 259; Carrington v. Smith, 8 Pick. R., 419, and Bonsey v. Amee, id., 237; Butterfield v. Baker, 5 Pick. R., 525; Gale v. Ward, 14 Mass. R., 352.

[7] 8 John. R., 97.

the title. Comyns, who is of himself a great authority, says that if a man pledge goods for money lent, he may redeem though he does not come at the day; and the practice has since become familiar.[1]

Possession must uniformly accompany the pledge; the right of the pledgee cannot otherwise be consummated. On this ground it has been doubted whether incorporeal things, like debts, money in stocks, &c., which cannot be manually delivered, were the proper subjects of a pledge; it is now held that they are so; and there seems to be no reason why any legal or equitable interest whatever in personal property may not be pledged; provided the interest can be put, by actual delivery or by written transfer, into the hands or within the power of the pledgee, so as to be made available to him for the satisfaction of the debt. Goods at sea may be passed in pledge by a transfer of the muniments of title, as by a written assignment of the bill of lading, just as debts and choses in action may be conveyed in pledge by a written assignment; for this is equivalent to actual possession, since it is a delivery of the means of obtaining possession.[2]

Though the general rule is, that where goods and movable chattels are transferred as security for the payment of a debt, with a stipulation that they may be redeemed within a given time, the transaction will be regarded as a mortgage; there may, it is held, be a pledge of stock, or choses in action, where the title passes.[3] On account of the incorporeal nature of the property, it is not capable of manual delivery. The delivery of the scrip or certificate of stock does not carry with it the stockholder's interest in the corporate funds, nor necessarily put that interest under the control of the pledgee. And hence the transfer of the title, being necessary to the change of possession, is entirely consistent with the pledge of the property; especially where by the terms of the contract, the debtor has a legal right to the restoration

[1] Dig., tit. Mortgage by Pledge of Goods, b.; 2 Caines' Cas. in Er., 200.
[2] Story on Bailm., § 290, 297; Wilson v. Little, 2 Comst. R., 443.
[3] Allen v. Dykers, 3 Hill R., 593, and 7 Hill R., 497; 2 Comst. R., 443.

of the pledge on payment of the debt, at any time before the creditor has exercised the power of sale given to him. There being a written contract, it will be construed fairly, so as to carry into effect the manifest intention of the parties to it.[1] And where there was a note given for the debt, reciting a deposit of stock as collateral security, executed concurrently with the transfer of the title to the stock, it was held that both should be construed together so as to limit and qualify the nature of the transfer.

No time of payment being agreed upon in the note given for the money borrowed, it is payable on demand; and though there be an authority to sell the stock without notice, this will not be construed to be a waiver of the demand for payment. There is in every contract of pledge a right of redemption on the part of the debtor, and where no time is fixed by the parties for the payment of the debt secured by a pledge, the pawnee cannot sell the pledge without a previous demand of payment, although the debt is technically due immediately.[2] Neither can the pledgee, where the contract of pledge does not expressly authorize the sale, sell the goods pledged without notice to the pledgor, even after the debt becomes due. The sale can only be made on reasonable notice to the debtor to redeem;[3] and if made without notice, the pledgee will be liable for the full value of the property pledged.[4] The debtor deposits his goods as a security for the payment of his debt and retains the title to them in himself, and the law will not permit him to be divested of his property, except upon reasonable notice, to the end that he may redeem or see to it that the pledge is sold for a fair price.

[1] Reeves v. Cappen, 5 Bing. N. C., 142; Clark v. Pinney, 7 Cowen R., 681; West v. Wentworth, 3 Cowen R., 82; Commercial Bank v. Kortright, 22 Wend. R., 348; Fisher v. Prince, 3 Burr., 1363; Greening v. Wilkinson, 1 Car. and Payne, 625; Harrison v. Harrison, id., 412.

[2] Stearns v. Marsh, 4 Denio R., 227; Story on Bailm., § 308.

[3] Tucker v. Wilson, 1 P. Wms., 261; Lockwood v. Ewer, 2 Atk., 303; Parker v. Branker, 22 Pick., 40; Hart v. Ten Eyck, 2 John., ch. 100; Patchin v. Pierce, 12 Wend. R., 61; Garlick v. James, 12 John. R., 146.

[4] McLean v. Walker, 10 John. R., 472, and 4 Denio R., 227.

If the principal obligation be conditional, that of the pledge is confirmed or extinguished with it.[1] If the obligation be null, so also is the pledge; for the pledge is a security collateral to the original undertaking; so that a discharge of the latter is a redemption of the pledge, by which the absolute property therein vests in the pawnor.[2]

The pawnee impliedly stipulates that he will take ordinary care of the goods pledged. Since the bailment is beneficial to the pawnee by securing the payment of his debt, and to the pawnor by procuring him credit, the rule which natural reason prescribes, and which the wisdom of nations has confirmed, makes it requisite for the person to whom a gage or pledge is bailed, to take ordinary care of it; and he must consequently be responsible for ordinary neglect.[3] This was the rule laid down by Bracton, who has been pronounced one of the best of our juridical classics, and who was a great common lawyer, notwithstanding he copied this principle and many others from Justinian almost word for word. Lord Holt held the same doctrine, and it has been uniformly enforced at common law.[4] The obligation of the pawnee to preserve the property, is equal to that of the person who has it in his custody on a bailment for hire.[5]

But the hirer for use, manifestly has a liberty in the using of the property which is not granted to the pawnee. If the goods pledged be such as will be the worse for using, the pawnee must not use them; but he may use so as not to injure them, being responsible for the perils to which they are subjected in consequence of the use to which they are applied.[6] The purpose of the bailment is to secure the bailee the payment of his debt; and hence he may not use the thing pledged without the consent of the owner, either expressly given or at least strongly presumed;[7] and this presumption varies, as the thing is likely to be better, or worse, or not at all affected, by usage.[8]

[1] Code of Louisiana, art. 3104.
[2] Elliot v. Armstrong, 2 Blackf. R., 198.
[3] Bract., 99, b.; Jones on Bailm., 75, 76.
[4] Coggs v. Bernard, 2 Ld. Raym., 909.
[5] Jones on Bailm., 120.
[6] 2 Ld. Raym., 909.
[7] Jones on Bailm., 80.
[8] Story on Bailm., § 329 to 332.

On payment of the debt for which the pledge is deposited in security, the pledgee is bound to redeliver the goods bailed; he cannot retain them for any other debt than that for which they were specifically given.[1] By a payment, or a tender of the amount of the debt secured, the pawnor acquires an immediate and absolute right of property in the pawn.[2]

When a chattel, such as a watch, is delivered in pledge for a loan of money to be advanced, and the party receiving it fails to advance the money and refuses to redeliver the watch, he is guilty of an act of conversion, for which an action in the nature of trover will lie. If the owner afterwards sells the watch, and the purchaser brings an action of trover for the chattel, he is bound to show an act of conversion after the sale to him. The contract of loan not having been executed, the owner had an immediate right of action for the refusal to redeliver; but a sale of the property so situated does not transfer his right of action, so as to enable the purchaser to bring the action in the nature of trover in his own name, grounded on the previous conversion.[3]

A right of action founded on a tort is not assignable.[4] The sale of the property conveys the title, but does not transfer previous rights of action arising out of transactions connected with the property, or with the custody of it. Even a right of action arising out of contract, connected with the safe keeping of the property, does not pass under a simple conveyance of the title to it. The contract may be assigned, so as to carry with it a right of action arising thereon; but a right of action already existing, which has grown out of a *tort* and is in the form of an action of tort cannot be transferred.[5]

[1] Jarvis v. Rogers, 15 Mass. R., 389; Gilliat v. Lynch, 2 Leigh, 493.

[2] McLean v. Walker, 10 John R., 471; Elliot v. Armstrong, 2 Blackf., 198.

[3] Hall v. Robinson, 2 Comst. R., 293; see also, Gardner v. Adams, 12 Wend. R., 297; and The Brig Sarah Ann, 2 Sumn. R., 206, 211.

[4] Code of Procedure, § 111; 12 Wend. R., 297; Thurman v. Wells, 18 Barb. S. C. R., 500.

[5] 18 Barb. R., 510, 14, 15.

What Property in the Pledgor and Pledgee.

The general property in chattels bailed under the contract of pledge, remains in the bailor, and only a special property in them passes to the bailee.[1] The bailor retains the title, and a right to redeem by discharging the original debt or obligation; and the bailee acquires the possession, with a right to detain the goods until his debt is paid. But the non-payment of the debt, even after it is due, does not work a forfeiture of the pledge; the title remains in the pledgor until it is legally divested, either by a foreclosure in equity or by a sale on due notice. Before giving such notice, the pledgee has no right to sell; and if he do so, the pledgor may recover the value of the pledge from him, without tendering the debt; because by the wrongful sale the pledgee has incapacitated himself to perform his part of the contract, that is, to return the pledge, and it would therefore be nugatory to make the tender.[2]

The mortgage of goods, with a stipulation that the mortgagor may redeem them by the payment of a sum named on a given day, is a very different contract. Here the title passes, and the mortgagor reserves only a naked right of redemption within the period agreed upon. As soon as that is passed, the right of the mortgagee becomes absolute.[3] Where there is a bill of sale of goods, executed and delivered as a security for money to become due, it is a mortgage and not a technical pledge; and the right of redemption does not continue beyond the default made in payment.[4]

The law does not permit a forfeiture of the pledge, for the reason that the pawn is in no respect an estate resting upon condition. Some of the earlier cases, which are reviewed at length in the case of Cortelyou v. Lansing, seem to have countenanced the idea that by a failure to redeem, the pledge

[1] Garlick v. James, 12 John. R., 147.

[2] Stearns v. Marsh, 4 Denio R., 227; Cortelyou v. Lansing, 2 Caines' Cases in Error, 200.

[3] Ackley v. Finch, 7 Cowen R., 290; Brown v. Bement, 8 John. R., 97.

[4] Barrow v. Paxton, 5 John. R., 259; 8 John. R., 97.

became forfeited;[1] but all the recent decisions hold the contrary doctrine,[2] and that the right to redeem continues in the pledgor until it is legally foreclosed. By the *lex commissoria* at Rome, it was lawful for the creditor and debtor to agree that if the debtor did not pay at the day, the pledge should become the absolute property of the creditor. But a law of Constantine, contained in the code, abolished this as oppressive, and, with marks of indignation, declared that the memory of the former law ought to be abolished to all posterity.[3] The Roman law did not allow a pledge to be sold by the creditor, but upon notice to the debtor, and the allowance of a year's redemption. And as this was not sufficiently observed, Justinian regulated the method of foreclosure by a particular ordinance, by which two years' notice or two years after a judicial sentence was allowed to the debtor. Under other codes a longer or shorter time of redemption is given, and different modes of foreclosure are prescribed; but Chancellor Kent asserts the belief that there is no country at present, unless it be England, that allows a pledge to be sold but in pursuance of a judicial sentence.[4] With us, where the foreclosure does not take place in equity, a sale on notice to the debtor is allowed to take its place.[5]

The rights of the parties in the goods pledged are not changed by the death of either of them, but descend to their representatives. This was held in one of the earliest cases reported, in an action of trover.[6] The special verdict stated that the plaintiff had pawned a hat-band, set with jewels, unto one Whitlock, a goldsmith, for twenty-five pounds, and no day was set to redeem. The pawnee on his death-bed delivered the pledge to the defendant, with a request to keep it till the money was paid, and then to deliver it to the plaintiff. The pawnee then died, and the

[1] 2 Caines' Cases in Error, 200.
[2] 2 Kent's Comm., 581, 582; Stearns v. Marsh, 4 Denio R., 227.
[3] 2 Caines' Cases in Error, 209.
[4] 2 Caines' Cases in Error, 213.
[5] 4 Denio R., 227.
[6] Sir John Ratcliffe v. Davis, 8 Jac. I in K. B.

plaintiff tendered the debt to his executor, who refused to receive the money, and then applied to the defendant and after a demand and refusal brought his suit. The court gave judgment for the plaintiff; and of course decided all the points arising out of the verdict, which were, that the tender to the executor was well made; that by the tender and refusal the special property revested in the plaintiff; that the general property had been constantly in him; that the death of the pawnee did not destroy the right of redemption; that the refusal by the defendant after tender to the executor, was a conversion, and that the defendant had only the bare custody of the pawn. In delivering the opinion in this case the court observe, extrajudicially, that if the time be limited to redeem, the death of either party, previous to that time, could not prejudice the right; but that if no time was limited, the pawnor had his whole life, and if he died before he redeemed, the right was gone, and his executors could not redeem.

But it is now well settled that on the deposit of a pledge, where no day of redemption is limited, the right of redemption descends to the personal representatives of the pawnor; if the pawnee sell the pledge without notice before application to redeem, he is answerable for the value of the pledge at the time of the application, and it is not necessary in such case to make an actual tender of the balance due.[1] There is, indeed, absolutely no reason why the death of either party to the contract should affect the right of redemption,[2] or prevent it from descending entire and unimpaired to the representative of the pawnor. The pledgee can acquire no right of property in the goods bailed by prescription, and the mere lapse of time confers upon him no new right of any kind.

The fact that the title to incorporeal property deposited in pledge, is transferred to the pawnee, does not convert the pledge into a mortgage, where it appears affirmatively that the transfer was made as a pledge.[3] This was distinctly

[1] 2 Caines' Cases in Error, 200.
[2] Str., 919.
[3] Wilson v. Little, 2 Comst., 443.

adjudged in Wilson v. Little, which was an action for wrongfully selling fifty shares of Erie railroad stock that had been deposited as a security for the payment of a loan of two thousand dollars. Though the title was actually transferred, it was held a pledge of stock, the transfer and the note, reciting the deposit as collateral security, being construed together as constituting one agreement.[1] On an ordinary loan of a certain number of shares of stock, one share being just as good as another, it would only be necessary to return the same amount of stock in kind. The loan in such a case is in substance a sale, to be repaid in kind and quantity, and the title to the stock loaned is immediately transferred to the borrower; whereas upon the loan of specific articles to be returned in specie, the title remains in the lender, and the borrower is only entitled to the temporary use thereof.[2] But such articles as are capable of being estimated generally by weight, number or measure, do not, when deposited as a pledge, become the property of the pledgee, as they do upon a loan of them; for the pledge is not for use, but merely as a security. If the pledgee, therefore, sells the pledge without authority, it is a violation of his trust, although he afterwards purchases other articles of the same kind and value, to be returned to the pledgor; unless there is some agreement, either express or implied, between the parties, that he shall be permitted to do so.[3]

At common law, goods pawned or pledged, are not liable to be taken in execution in an action against the pledgor.[4] The possession of the pledgee could not be disturbed, because the officer could acquire no greater interest in, or control over the property than that possessed by the defendant, against whom he held the process of the court. And as public sales of personal property, not within the view of

[1] Allen v. Dykers, 3 Hill R., 593; 7 Hill R., 497.

[2] 3 Ersk. Inst., tit. 1, § 18.

[3] Per Chancellor Walworth, in Dykers v. Allen; and Nourse v. Prime, 4 John. Ch. Rep., 490.

[4] Wilkes v. Ferris, 5 John. R., 336; Marsh v. Lawrence, 4 Cowen R., 461; Badlam v. Tucker, 1 Pick., 389; Pomeroy v. Smith, 17 Pick., 85; Scott v. Sholey, 8 East, 467; Metcalf v. Scholey, 5 Bos. and Pull., 461.

the bidders at the sale, were declared void by judicial decisions, on the plainest grounds of public policy, it became extremely difficult to sell even the pledgor's interest in the property on execution.[1] Where the property was so situated that it could be brought within the view of the bidders, it seems, property in the nature of a pledge might be sold on execution, but not so as to defeat the interest of the pledgee.[2] The interest of the bailor could be sold, but the possession of the bailee having a lien or special property in the goods levied upon, could not be disturbed; there could be, in fact, no taking or actual seizure under the execution.[3] Hence it frequently happened that the pledging, of many kinds of personal property, operated to place them beyond the reach of an execution; and this induced the passage of the statute in this state, authorizing a sale of the pledgor's right or interest in the goods or chattels pledged for the payment of money, or for the performance of any contract or agreement.[4]

Under this statute the question was seriously litigated whether the sheriff, holding an execution against a pledgor, may by virtue thereof take the property pledged out of the hands of the pledgee into his own possession, for the purpose of selling the interest of the pledgor therein. And it was held, first, that the right and interest of the pledgor cannot be sold on execution unless the goods be present and within the view of those attending the sale;[5] that for the purpose of the sale the sheriff may under this statute seize and detain the goods in the same manner as if they were not under pledge, but that he must sell them subject to the lien of the pledgee; and that after the sale, he must hold them in the custody of the law to await a redemption by the purchaser. If not redeemed presently, the sheriff must then

[1] Linnendoll v. Doe and Terhune, 14 John. R., 222; Sheldon v. Soper, id., 352; Cresson v. Stout, 17 John. R., 116.

[2] Moore v. Hitchcock, 4 Wend. R., 292; Wheeler v. McFarland, 10 Wend. R., 318.

[3] Reynolds v. Shuler, 5 Cowen R., 323; 7 Cowen R., 735 and 670.

[4] Bailey v. Burton, 8 Wend. R., 339; 2 R. S. p. 464, 3d ed.

[5] Blackwell v. Ellsworth, 6 Hill R., 484; Franklin's case, 5 Rep., 47.

deliver them again into the custody of the pledgee, to whom the purchaser must look for them. The effect of such a sale under the statute is to vest in the purchaser the precise right and interest of the pledgor. Afterwards the purchaser may of course redeem upon the same terms.

The twentieth section of the statute in question, authorizes the sale of the right and interest of the pledgor in the goods pledged, on execution; the twenty-first section declares that no sale of any goods and chattels shall be made by virtue of any execution unless a previous notice is given of the time and place where the sale is to be had; and the twenty-third section provides that no personal property shall be exposed for sale unless the same be present and within the view of those attending such sale. The mode of sale is here so regulated by the statute as to require the officer to have the custody and control of the property sold. He must advertise the time and place of sale, and he must have the property there, within the view of all persons attending the sale; and for this purpose he may levy upon and take the property pledged out of the hands of the pledgee into his own possession,[1] but he must sell subject to the rights and interest of the pledgee, under the terms and conditions of the pledge. It was argued in Stief v. Hart, that although the sheriff was authorized under the twentieth section to sell the right and interest of the pledgor on execution against him, yet the statute had not conferred any authority on him to seize and take into his possession the goods in the hands of the pledgee, preparatory to such sale; that he should sell without interfering with the possession of the pledgee; and that the term *personal property*, used in the twenty-third section, did not include the *right and interest* mentioned in the twentieth section; from which it was claimed, the conclusion arose that the sheriff might legally and properly sell such right and interest of the pledgor, without having the property present and within the view of the persons attending the sale. But the court held otherwise, construing the term

[1] Stief v. Hart, 1 Comst. R., 20.

personal property as synonymous with the words *right and interest*, as they are used in these sections,[1] and thus holding that the goods pledged must be present at the time and place of sale; and that to accomplish a sale in the prescribed manner, the sheriff has a right, by necessary implication, to take and hold the goods preparatory to a sale of the right and interest of the pledgor therein.[2] Without such a right of seizure in the sheriff, it was maintained that it would depend entirely upon the mere volition of the pledgee to produce the property at the time and place of sale, or to remove it from public inspection, thereby permitting or defeating the sale at his pleasure; an absurdity not to be ascribed to the legislature in framing the statute.

It is to be noticed that the effect of a sale on an execution against the pledgor, is not in any respect to vary the terms of the contract of pledge. If the pledge be made to secure the payment of a sum of money to fall due at some future time, or to secure the pledgee against a conditional liability that may or may not accrue against him, and which cannot be determined at the time of the sale, it is manifest that the goods pledged must abide the terms of the contract under which the pledgee holds them. The purchaser's right of redemption is the same exactly, and dependent upon the same terms and conditions as that of the pledgor.[3] He is entitled to possession of the goods, on complying with the terms and conditions of the pledge; and when these cannot be complied with until some future event has occurred, the pledge must of course be redelivered into the hands of the pledgee.

[1] 6 Hill R., 484.

[2] 1 Comst. R., 20; Stief brought replevin against Hart, sheriff, for a quantity of goods which defendant had levied upon and taken on execution; on the trial it appeared that the plaintiff held them in pledge, and that the sheriff took the goods from his custody on an execution against the pledgor; and the circuit judge charged the jury that the sheriff had a right so to take the property into his possession in order to sell the pledgor's interest therein. Plaintiff excepted, and moved the supreme court for a new trial; the motion was denied, and the court of appeals affirmed the judgment of the supreme court by a vote of four to four.

[3] 6 Hill R., 484; 2 R. S., 464, § 20, 3d ed.

The decision in Stief v. Hart, concedes to the officer rights over the pledged chattels which the defendant in the execution could not exercise; the officer charged with an execution against the pledgor, levies upon and seizes the goods, at a time when the pledgor has not the possession, nor any right of control over them; but this is justified on the ground of public policy. To prevent frauds, it is necessary that sales of personal property should be made publicly, and in such a manner that the articles, offered for sale, may be inspected.[1] There are also other cases, in which the law clothes the officer with rights superior to those of the defendant in the execution; where one of two partners has the actual possession of the partnership property, under an execution against the other partner out of possession, the officer is armed with an authority which that partner has not, namely, the authority to seize the partnership goods in the hands of the other partner, and to use force, if necessary, to take them into his custody; and that not merely for the temporary purpose of affecting a sale and then restoring the possession, as in the case of goods pledged; but the sheriff is authorized to deliver the possession to the purchaser, thus putting it beyond the reach of him from whom he took it.[2] So, the sheriff may enter the premises of a stranger against his will to take the goods of the debtor which happen to be there, although the debtor himself would be a trespasser in doing so. In these cases the sheriff is justified, because he could not otherwise satisfy the exigency of the writ, to do which he is clothed with the requisite authority and bound by his duty. When the law authorizes an act, it authorizes what is necessary to accomplish it,[3] presuming that its ministerial officer will act discreetly and so as not unnecessarily to interfere with or disturb the rights of other parties.

[1] 14 John R., 222 and 352; 17 John R., 116.

[2] Phillips v. Cook, 24 Wend. R., 389; Melville v. Brown, 15 Mass. R., 82; Waddell v. Cook, 2 Hill R., 47; Mersereau v. Norton, 15 John R., 179. A sale in such cases conveys only the interest of the defendant in the execution, so that the purchaser becomes a tenant in common with the other partner.

[3] Williams v. Amory, 14 Mass. R., 27.

Personal property pledged by way of a mortgage, may, after forfeiture, be levied upon by virtue of an execution against the mortgagee, although it remains in the hands of the mortgagor.[1] A mere chose in action cannot be levied upon and sold on execution.[2] Bonds, notes, shares of stock and property of that nature, cannot be seized and taken in execution by the sheriff;[3] neither can a mere equity in the proceeds of personal property be sold on execution.[4] But when the mortgagor of a chattel has a right to redeem and a right to the possession for a definite period before the property can become forfeited, he has such an interest as may be sold on execution. The purchaser in such cases takes the property subject to the incumbrance; he purchases the right of the mortgagor, which is a right to the possession and absolute ownership, subject to the incumbrance; but if the mortgage at the time of the sale on execution has been forfeited, the mortgagor has no longer the right of possession; all the right he then possesses is an equity, which cannot be thus sold.[5] So where it is a condition in a lease of personal property that the lessee shall keep it upon particular premises and not remove it therefrom, a removal of such property by the lessee operates as a forfeiture of the term and divests his title, so that no interest in the property removed remains in him that can be sold on execution; because by the forfeiture the title is vested in the lessor with the right of immediate possession.[6] The established principle is that a person in possession of a chattel, having a right to such possession for a specific time, has an interest which may be sold; and when that interest expires the owner is entitled to his goods and may bring an action for them.

[1] Ferguson v. Lee, 9 Wend. R., 258; see also 4 Denio R., 171.

[2] Ingalls v. Lord, 1 Cowen R., 240.

[3] Denton v. Livingston, 9 John R., 97.

[4] Hendricks v. Robinson, 2 John, ch. R., 296.

[5] Bailey v. Burton, 8 Wend. R., 339; Marsh v. Lawrence, 4 Cowen R., 461; Otis v. Wood, 3 Wend. R., 500.

[6] 3 Wend. R., 498; in McCracken v. Luce, not reported, it was held, that a mortgagor of a canal boat, in possession and having the right of possession for a certain time, had an interest which was the subject of sale on execution.

The officer sells only the interest of the party in possession; and even though he assumes to sell the absolute property in the goods, the purchaser will acquire no greater rights in them than that possessed by the defendant in the execution.[1]

The general rule is that liens at law on personal property exist only in cases where the party entitled to them has the possession of the goods: and if he once part with the possession after the lien attaches, the lien is gone.[2] Being in the nature of a security resting on property for the payment of a debt, the pledgee's lien cannot be separated either from the possession of the goods, or from the debt: it is collateral to the debt, and it must accompany the possession. His interest may be transferred; it will pass at his death to his personal representative, or he may, it seems, assign over his interest in the pawn so that the assignee will take his rights and responsibilities under the contract of pledge.[3] In a bailment by way of a loan for use, the borrower cannot convey his interest in the trust;[4] because his contract is essentially personal, involving a trust which is not assignable. But the contract of pledge is by no means so strictly personal; and the trust reposed in the pledgee does not demand his personal oversight.[5] From the decisions, it appears, that the pawnee may deliver the goods to a stranger without consideration: or he may sell and assign all his interest absolutely: or he may assign it conditionally by way of pawn; without, in either case, destroying his lien or giving to the owner a right to reclaim on any other or better terms than he could have done before such delivery or assignment.[6]

But it is evident that the pawnee's interest is such that it cannot he reached and sold on an execution against him; for his lien appertains to the debt, for which he holds the pledge as a security; and even his debt is but a chose in

[1] Van Antwerp v. Newman, 2 Cowen R., 543.

[2] Lickbarrow v. Mason, 6 East, 27.

[3] 2 Kent's Comm., 579; Story on Bailm., § 324; 2 Caines' Cas. in Er., 210.

[4] Hasbrook v. Vandevoort, 4 Sand. R., 74; 2 Kent's Comm., 574.

[5] Ingersoll v. Von Bokkelin, 7 Cowen R., 670.

[6] Jarvis v. Rogers, 15 Mass. R., 408; Ratcliffe v. Davis, 1 Bula., 29; More v. Conham, Owen, 123; Whitaker v. Sumner, 20 Pick, 399, 406.

action which cannot be levied upon.[1] As his lien cannot be severed from the debt, so that the chose in action may be owned by one man and the lien held by another, it is plain that a transfer by the pledgee of all his interest in the pawn, in order to be available in the hands of the assignee, must carry with it the original debt; for the lien is not a distinct and independent right of property capable of being transferred or assigned.[2] The party having a lien upon goods may, however, transfer the possession subject to the lien to a third person, who may lawfully hold the property until the lien be paid. The lien is a personal right and cannot be separately assigned;[3] but the goods and the lien may be passed over as a mere security to another for a debt, and the lien be preserved.[4]

If the pawnee voluntarily surrender the possession of the pawn, by delivering it back to the pawnor, his lien will be thereby terminated.[5] Not so if the pawn be delivered back to the owner for a temporary purpose only, on an agreement that it shall be restored; for in this case the pledgee may recover it against the owner, if he refuse to restore it after the temporary purpose is fulfilled.[6] So, if it be delivered back to the owner, in a new character, as for example, as a special bailee or agent. Here the pledgee will be still entitled to the pledge, not only as against the owner, but also as against third persons.[7]

Where the pledgee of a bond delivers it to the pledgor, for a particular purpose, as to be exchanged for stock, and to return the latter, and the pledgor converts the bond to his own use, the pledgee has a right of action to recover

[1] 1 Cowen R., 240; 9 John R., 97; 2 John. Ch. R., 296.

[2] 5 T. R., 606; but see Saul v. Cruger, 9 How. Pr. R., 569, which holds the pledgee's interest may be sold on execution, so as to convey his right of possession.

[3] Danbigny v. Duval, 6 T. R., 604.

[4] M'Combie v. Davies, 7 East, 7; 7 Cowen R., 680; Nash v. Mosher, 19 Wend. R., 431.

[5] Homer v. Crane, 2 Pick., 607; Jarvis v. Rogers, 15 Mass., 389.

[6] Roberts v. Hyatt, 2 Taunt., 266; Story on Bailm., § 299.

[7] Macomber v. Parker, 14 Pick., 497.

for the bond; and the measure of damages in such a case is the value of the bond, with interest from the time of the conversion, unless such amount exceeds the sum due to the pledgee; in which case, that sum is the proper measure of damages.[1] In this action it is no defence that the pledgee wrongfully sold other securities which he held for the same debt; and a notice to produce the bond at the trial is not necessary to enable the plaintiff to give parol evidence of its contents; for the action is notice.[2] In an action of trover for a promissory note, the note being shown to be in the possession of the defendant, or under his control, it is held that the bringing of the suit is a sufficient notice to produce the note alleged to have been converted.[3]

The rule in respect to the notice required to produce the instrument in such cases, is well expressed by Mr. Justice Le Blanc: "When the contents of a written itstrument may be proved as evidence in a cause, and it is uncertain beforehand, whether or not such evidence will be brought forward at the trial, we see the good sense of the rule which requires previous notice to be given to the adverse party to produce it, if it be in his possession, before secondary evidence of its contents can be received, that he may not be taken by surprise; but when the nature of the action gives the defendant notice, that the plaintiff means to charge him with the possession of such an instrument, there can be no necessity for giving him any other notice."[4]

After the debt for which the pledge is given has been paid, the right of property vests absolutely in the pledgor; who may in some cases file his bill in equity to compel its redelivery. Where the pledge consists of stock, on which dividends have been received by the pledgee, of which an account is prayed for, or where there has been an assignment of the pledge by the bailee, relief may be had in equity; and a decree will be made that the pledgee, or his

[1] Hays v. Riddle, 1 Sand. R., 248.
[2] People v. Holbrook, 13 John. R., 90; How v. Hall, 14 East, 274.
[3] Bissel v. Drake, 19 John. R., 66.
[4] 14 East, 274.

assignee where there has been an assignment, account for the dividends received, and transfer and redeliver the stock to the pledgor.[1] But the usual remedy is by an action at law, sometimes in the nature of trover for a refusal to redeliver on demand; sometimes in the nature of replevin for detaining the goods; depending in each case upon the circumstances attending the transaction.[2] If the goods pledged have been wrongfully sold by the pledgee, a recovery may be had against him in a suit in the nature of an action on the case;[3] or in assumpsit to recover the value of the property.[4] If the debt for which the pledge is deposited in security has not been paid, and an action is brought for the appropriation or conversion of the pledge, the pledgee may have the amount of his debt *recouped* in the damages.[5] The debt being paid, the creditor is bound to restore the pledge in the condition he received it, or make satisfaction for any injury that it has received; for it is a rule, that a creditor is to restore the pledge or make satisfaction for it; if not, he is to lose his debt.[6]

The relation in which the pledgee stands towards the pledgor under his contract, is very similar to that which the factor holds towards his principal; and it is well established that the factor has no right to pledge his principal's goods.[7] But although a factor cannot pledge the goods of his principal as his own, he may deliver them to a third person as security, with notice of his lien, and as his agent, to keep the possession for him, in order to preserve that lien.[8] This is a continuance in effect of the factor's possession, and not

[1] Hasbrook v. Vandervoort, 4 Sand. R., 74; Hart v. Ten Eyck, 2 John. Ch. R., 62, 100; Kemp v. Westbrook, 1 Vesey, Sen., 278.

[2] Holbrook v. Wright, 24 Wend. R., 169; 2 Caines' Cases in Error, 200; 5 John. R., 258; 8 id., 97.

[3] Wilson v. Little, 2 Comst. R., 443.

[4] Stearns v. Marsh, 4 Denio R., 227; Hill v. Perrott, 3 Taunt., 274; Butts v. Collins, 13 Wend. R., 139 to 154.

[5] Bac. Abr., Bailment, B; 15 Mass. R., 389; 4 Denio R., 227.

[6] 1 Reeve's Hist. Eng. Law, 161, 162.

[7] Kennedy v. Strong, 14 John. R., 128.

[8] Urquhart v. M'Iver, 4 John. R., 103; Laussat v. Lippencott, 6 Serg. and Rawle., 386.

a pledging of the principal's interest in the goods. So long as the factor retains the control of the goods so that he can at any time take them into his custody, he may preserve his lien.[1] By pledging them as his own, he renders himself liable for their value; because he thereby appropriates them to his own use and is answerable for a conversion of the property.

Wherever the principal can trace his property, as distinct from that of the factor, he can recover it, into whosesoever hands it may come.[2] If it is pawned by the factor, the principal may, after a demand and refusal, maintain an action for its recovery against the pawnee;[3] for the pawnee is bound to know, at his peril, the extent of the factor's power;[4] he cannot plead his ignorance, that he did not know the pawnee held the goods in the character of a factor; neither can he retain the goods till the balance due from the principal to the factor has been paid; the lien is lost by the tortious act of the factor in pledging them for his own debt.[5]

Mr. Justice Story criticises the decisions on this subject as somewhat inconsistent, in permitting the factor to assign his interest and lien, with the custody of the goods, and at the same time holding his contract by which he assumes to pledge the goods absolutely, to be wholly void; and he favors the opinion that such a delivery in pledge should be held good to the extent of the factor's interest and lien, asserting that the American decisions have not yet been carried to the extent of holding such a pledge altogether tortious, so that the title is not good in the pledgee even to the extent of the factor's lien.[6] Certainly the innocent pledgee, who has received the goods in pledge without notice of the defect in the title, ought not to be deprived of even the partial or special property in the goods bailed, which the factor did

[1] Holbrook v. Wright, 24 Wend. R., 169.

[2] Thompson v. Perkins, 3 Mason R., 232.

[3] Van Amringe v. Peabody, 1 Mason R., 440; Bowie v. Napier, 1 M'Cord, 1.

[4] 2 Kent's Comm., 626: Patterson v. Tash, 2 Str. R., 1178; 5 Term R., 604.

[5] Guerreiro v. Peile, 3 Barnw. and Ald., 616; M'Combie v. Davies, 7 East, R., 5; Martini v. Coles, 1 Maule and Selw., 140.

[6] Story on Bailm. § 325, 326.

own, merely because he had not a perfect title. But the true ground of the decisions on this point, at common law, is probably the public policy, which demands a rigid enforcement of the duties of the factor, so as to restrain him from an unauthorized disposition of the goods of his principal.

The rigor of this rule sometimes worked a hardship upon those who dealt with the factor in the belief that he was the true owner, and the statute of 6 Geo. IV, ch. 94, was made to remedy the mischief. Since that time our own legislature has passed an act for the amendment of the law relative to principals and factors.[1] This act was intended for the security of those who deal with the factor or agent in the belief that he is the true owner.[2] One who receives goods from the factor as such, knowing that he is not the owner, and advances money on them, cannot under this statute retain them for his advances; because he acquires no lien. This is distinctly adjudged in the case of Stevens v. Wilson;[3] in which our statute though framed somewhat differently, is construed so as to accomplish nearly the same result as that reached by the English statute. Chancellor Walworth, who delivered the prevailing opinion in the cause, assumes that prior to the statute it had been established by many decisions so as to be considered a settled principle of law, that a factor could not pledge so as to transfer his lien to the pawnee;[4] and that this rule of the common law was founded upon the principle that he who deals with one acting *ex mandato*, can obtain from him no better or different title than that which his mandate authorizes him to give.

The English statute expressly authorizes the agent or factor to pledge the goods of his principal to the extent of his lien, to persons who are aware of his fiduciary character and without any authority for that purpose from his principal;

[1] Statute 1830, p. 203.

[2] Stevens v. Wilson, 6 Hill R., 512.

[3] 3 Denio R., 472; 4 Geo. IV, ch. 83; 6 Geo. IV, ch. 94; Fletcher v. Heath, 7 Barn. and Cres., 517; Blandy v. Allen, Darson and Lloyd's Merc. Cas., 22.

[4] Graham v. Dyster, 6 Maule and Sel., 1. Lord Chief Justice Tenterden delivered the opinion in this case.

but it has been held even under that act, that a mere liability of the factor, upon acceptances, for his principal, does not give the factor a lien which will authorize him to pledge the goods to a third person without the consent of his principal.[1]

Our statute does not go so far, but it seems to permit the factor to pledge the goods to the extent of his lien; at all events, the fifth section assumes that in some instances the pawnee may detain the goods until the lien of the factor shall be satisfied. From analogy, with other decisions made under the act, it would seem that the pawnee cannot acquire a lien even to the extent of that possessed by the factor, where he knows that the person making the pledge does not own the goods.[2] The seventh section of the statute impliedly prohibits the pledging of them for a loan of money; but it may well be that the right of the factor to deliver them to a third person for his own security, with notice of his lien, is still preserved, on the ground that this is in effect but a continuance of the factor's possession.[3]

One of the objects sought in the enactment of the statute in question doubtless was, to harmonize the decisions on the subject of factors and agents, with well understood and recognized principles, so that those who should deal with the person having the possession of personal property, with the usual *indicia* of title, might be protected from losses arising from contracts, made with the factor on the faith that he was the true owner of the property. The act does not seem to have been designed for the benefit of the factor, or for the enlargement of his powers; but rather for the protection of third persons, dealing with him in ignorance of his true character. Where one, who is not the owner, ships goods in his own name and assigns the bill of lading to another, who advances money thereon, and an action is afterwards brought by the true owner, alleging title, the defendant, in possession of the goods on which he made the advances,

[1] 7 Barn. and Cres., 517.

[2] 3 Denio R., 472.

[3] 2 Kent's Comm., 626; M'Combie v. Davies, 7 East R., 5; Urquhart v. M'Iver, 4 John. R., 103. This point is not decided in Stevens v. Wilson, 6 Hill, 515.

must traverse the plaintiff's title. The issue is joined on the title; and the facts accompanying the transaction may be given in evidence by the defendant to sustain him in his traverse.[1]

It is a principle of the common law, which has but few exceptions, and these are treated as such, that a man cannot be divested of his property without his consent. And although possession is one of the most usual evidences of title to personal chattels, yet as a general rule, mere possession will not enable a man to transfer a better title than he has himself, or than he has been authorized by the owner to grant.[2] Exceptions in favor of trade are allowed in the case of money and negotiable instruments, which have a circulation as currency. But as to other personal chattels, the mere possession, by whatever means it may have been acquired, if there be no other evidences of property, or authority to sell from the true owner, will not enable the possessor to give a good title. Although on a sale the owner delivers the possession of the property, if there be a condition that the title shall not pass until the price is paid, the voluntary assignee of the purchaser will acquire no right as against the owner.[3]

The third section of the act, relative to principals and factors or agents, provides that: "Every factor or other agent intrusted with any bill of lading, custom-house permit, or warehouse keeper's receipt for the delivery of any such merchandise, and every such factor or agent, not having the documentary evidence of title, who shall be intrusted with the possession of any merchandise for the purposes of sale, or as a security for any advances to be made or obtained thereon, shall be deemed to be the true owner thereof, so far as to give validity to any contract made by such agent with any other person for the sale or disposition of the whole or

[1] Prosser v. Woodward, 21 Wend. R., 205; Pringle v. Phillip, 1 Sand. R., 292; 1 Saund. R., 22; Bemus v. Beekman, 3 Wend. R., 667; Rogers v. Arnold, 12 id., 30.

[2] Covill v. Hill, 4 Denio R., 323; 1 Comst. R., 522; Pickering v. Busk, 15 East R., 38.

[3] Haggerty v. Palmer, 6 John. Ch. R., 473.

any part of such merchandise, for any money advanced, or negotiable instrument or other obligation in writing given by such other person upon the faith thereof."[1]

Under this the words, *upon the faith thereof*, are construed to refer to the ownership of the goods;[2] so as to protect the purchaser or pledgee, who has advanced his money or given his negotiable note or acceptance or other written obligation, upon the faith or belief of the fact that the person with whom he dealt was the real owner of the property. Any other construction would authorize the agent or factor to commit a fraud upon his principal, with the connivance of the purchaser or pledgee who had notice of the fiduciary character of the vendor or pledgor; and it would be in conflict with the seventh section, which makes such a fraud an indictable offence as against the agent and all other persons conniving with him in its commission.

The first section of this statute enacts that every person, in whose name any merchandise shall be shipped, shall be deemed the true owner, so as to give to the consignee a lien for advances made by him or on his behalf thereon; the second section limits this lien to cases where the consignee had no notice that the consignor was not the true owner; and the fourth section prevents any person from acquiring a lien on such goods, by receiving them in deposit from the agent or factor, as a security for any antecedent debt or demand, beyond the interest or lien of the agent at the time of the deposit. But the statute does not authorize the agent or factor to pledge the goods of his principal to the extent of his lien, to persons who are aware of his fiduciary character.

Where property is delivered to a forwarder or carrier, upon consignment to a factor for sale, but the receipt or bill of

[1] 2 R. S., 59, 60, 3d ed.

[2] 3 Denio R., 475. The first section of the English act protects the consignee without notice, and others dealing with him; the second protects persons dealing with the factor, in possession, with documentary evidence of title, for advances upon the deposit or pledge of goods; the third prohibits a lien for an antecedent debt, except to the extent of the factor's lien; and the fifth section permits a pledge in any case to the extent of the agent's lien.

lading is not delivered or sent by the owner to the factor, and the property has not reached him, the factor acquires by the transaction no general or special property in the goods; and this is so notwithstanding the consignor is indebted to the factor upon previous consignments, to an amount greater than the value of the goods. The owner of a quantity of flour, delivered the same to a forwarder at Rochester, and took a receipt expressing that the flour was to be sent to the defendant at Albany; the defendant being the factor to whom the owner usually consigned flour for sale, and to whom he was at the time indebted for advances on previous consignments: the owner on the same day drew upon the defendant against the flour and procured the plaintiff's bank at Rochester to discount the draft, on delivering to the bank the forwarder's receipt and agreeing that the bank might hold it as security for the acceptance of the draft; the defendant refused to accept the draft, but subsequently received the flour and converted it to his own use, having notice of the transaction with the plaintiff's bank; and it was held that the defendant was liable to the plaintiff in trover for the flour,[1] and that as between the owner and the bank the transaction may be regarded as a pledge or mortgage of the flour. The delivery of the carrier's receipt to the bank, was a symbolical delivery of the flour.[2] Even a sale or pledge of the property, without a formal bill of lading by the shipper, it seems, will operate as a good assignment of the property, and the delivery of an informal unindorsed bill of lading, or other documentary evidence of the shipper's property, will be a good symbolical delivery so as to vest the property in the vendee or pledgee.[3]

To render a mortgage of personal chattels valid as against the creditors of the mortgagor and subsequent purchasers and mortgagees in good faith, it is necessary that it should

[1] The Bank of Rochester v. Jones, 4 Denio R., 489 and 4 Comst. R., 497.

[2] Haille v. Smith, 1 Bos. and Pull., 563; Tooke v. Hollingworth, 5 Durnf. and East, 215; Allen v. Williams, 12 Pick R., 297.

[3] Per Chief Justice Shaw in Allen v. Williams.

be in writing and duly filed; but there is no such necessity as between the immediate parties to the mortgage of goods.[1]

In like manner there may be a pledge where the delivery is only symbolical. The delivery of the key of the warehouse in which goods sold are deposited, is a sufficient delivery of the goods to transfer the property. A written order from the vendor on the person who has the custody of the goods, directing their delivery to the vendee, is a sufficient delivery. So also a delivery of the receipt of the store-keeper for the goods, being the documentary evidence of the title, is tantamount to a delivery of the goods.[2] There is no reason for requiring a more perfect delivery in the case of a pledge of goods, than the law demands on an absolute sale.[3] The delivery of a bill of lading, as security for the payment of a loan made thereon, is a good assignment of the cargo, and even though unindorsed, is a good delivery so as to transfer the property.[4]

Under the civil law, as well as under most of the codes of continental Europe, possession is evidence of title to movable goods; and the factor may pledge the goods of his principal so as to bind them for any advances made thereon, but not as a security for an antecedent debt or demand.[5]

The factor is generally regarded in the decisions as invested with the rights of a pledgee of the goods intrusted to him, and charged with very nearly, if not the same responsibilities. In either case, if the bailee appropriate the goods as his own, he is liable for their value.[6] But the pledgee has a right of assignment, which it seems the factor does not possess, at least not to the same extent; for it is conceded that the pawnee may assign his interest in the pawn, either

[1] 2 R. S., 196, 3d ed; Wood v. Lowry, 17 Wend. R., 492; Sanger v. Eastwood, 19 Wend. R., 514; Nash v. Ely, id., 523; Smith v. Acker, 23 Wend. R., 653; Camp v. Camp, 2 Hill R., 628; 10 Paige R., 127, 205.

[2] Wilkes v. Ferris, 5 John. R., 335; Searle v. Reeves, 2 Esp. Cases, 598; Lansing v. Turner, 2 John. R., 14; Bailey v. Ogden, 3 John. R., 399.

[3] 1 Bos. and Pul., 563.

[4] 12 Pick. R., 302; 16 Pick. R., 467; 4 Comst. R., 497.

[5] 1 Bell Comm., 483–488, 5th ed.

[6] 3 Barnw. and Ald., 616.

absolutely or conditionally by way of pawn to another, without affecting his lien.[1] On the other hand, the factor, in the absence of instructions to the contrary, is clothed with a power of sale, not given to the pawnee;[2] and he may sell for cash or on credit, according to the established usage, without rendering himself liable.[3] The law implies that one who is employed to sell as a factor, is authorized to do so in the usual manner; and consequently that he may sell on credit where that is customary, without incurring risk, provided he does not unreasonably extend the term of credit, and provided he makes use of due diligence to ascertain the solvency of the purchaser. He acts as a commercial agent, whose character and rights are accurately defined. He is not obliged to disclose to his purchaser the name of his principal, or that he sells as a factor. He may or may not take an instrument in writing as evidence of the debt. He may maintain an action in his own name for the price of the goods, and give a valid discharge; but his principal may interpose at any time before payment, arrest his agent's right, and recover against the vendee in his own name.[4]

Where the factor is permitted by his instructions or by custom to sell on credit, he is not liable though he take a note for the purchase money payable to himself. For the note does not extinguish the demand for goods sold, but leaves the principal to his usual remedy.[5]

The pawnee has a special property in the pawn, and in some instances a right to the reasonable use of the thing pawned. But the use, not being the object of the contract, must be such as will not diminish the value of the pledge

[1] 7 Cowen R., 670; 20 Pick. R., 399, 406; 15 Mass. R., 408; 13 Pick. R., 216; 14 id., 497; Story on Bailm., § 327, 350; Hasbrook v. Vandervoort. 4 Sand. R., 74.

[2] Van Allen v. Vanderpool, 6 John. R., 69; Goodenow v. Tyler, 8 Mass. R., 36.

[3] Scott v. Surman, Willes R., 406; 6 Term R., 12; Russel v. Hankey, 1 Camp. N. P., 258.

[4] Corlies v. Cumming, 6 Cowen R., 181; Drinkwater v. Goodwin, Cowp., 256; Johnstone v. Osborne, 11 Adolph. and Ell., 549; 4 Mass. R., 258.

[5] 6 Cowen R., 181; 7 Mass. R., 36. Authority to sell does not authorize a sale on credit, unless it be a known usage of trade that the article in question is ordinarily so sold. Delafield v. The State of Illinois, 26 Wend. R., 192.

and such as it may fairly be presumed the pawnor gave his consent to. If the pledge be such as will be never the worse for being used, as jewels, it may be used; but only at the peril of the pawnee, who is answerable in case of loss. But where the pawn is of such a nature that the pawnee is at a charge for its keeping, as a horse or cow, he may use the horse in a reasonable manner, or milk the cow in recompense for the meat.[1]

The interest of the pledgee, in the articles pledged, is not such as to improve or ripen by time; for he is not allowed to claim property in them by prescription, and there is, properly speaking, no forfeiture permitted under the contract.[2] If he blends or so confounds them with his own, that they cannot be distinguished, he must bear all the inconvenience of the confusion; if he cannot distinguish and separate his own he shall lose it; or if damages are given against him in consequence of the confusion, the utmost value will be taken.[3] The damages, however, will not be inflicted arbitrarily, nor will the inference be drawn against the pledgee more strongly than a strict equity demands. Where certain stocks were given as collateral security for a loan of money, payable at a future day, and blended with the mass of shares of the same stock held by the creditor, but who actually retained all the while a number equal to the shares pledged; it was adjudged that the shares so standing in the name of the pawnee were to be considered as the shares pledged, and that the pledgee was at liberty to sell according to the contract, the shares so deposited in pledge.[4] But, it seems, if he wrongfully sell the stock before his debt becomes due, that he will be held liable for the highest price at which the stocks have been sold during the period of credit covered by the pledge.

[1] Coggs v. Bernard, 2 Ld. Raym., 909.
[2] 2 Caines' Cases in Error, 200; 2 Kent's Comm., 583, 3d ed.
[3] Hart v. Ten Eyck, 2 John. Ch. R., 62.
[4] Nourse v. Prime, 4 John. Ch. R., 490; 7 id., 69.

Care required of the Pawnee.

The bailment by pledge, being beneficial to both parties to the contract, the bailee is bound for ordinary care and must answer for ordinary neglect.[1] Ordinary neglect is defined to be, the omission of ordinary care; that is to say, the omission of that care which every man of common prudence and capable of governing a family, takes of his own concerns.[2] This was the rule laid down by Bracton, who wrote his treatise *de Legibus et Consuetudinibus Angliæ* as early as the reign of Henry III, as is generally supposed in the latter part of that long reign, which commenced in 1217 and continued fifty-six years.[3] Lord Holt quotes him as an old author to the effect, that if a creditor takes a pawn, he is bound to restore it upon the payment of the debt; but yet it is sufficient, if the pawnee use true diligence, and so doing, he will be indemnified notwithstanding the loss, and he may resort to the pawnor for his debt.[4] He is bound to take that care of the pledge which a prudent man takes of his own property. He is not bound for the exactest diligence, such as is demanded of the borrower; and he is liable for a greater degree of care than the law exacts of the depositary without reward.[5]

If goods be delivered to one as a gage or pledge, and they be stolen, he shall be discharged because he hath a property in them; and therefore he ought to keep them no otherwise

[1] Jones on Bailm., 75, 76, 119; 2 Kent's Comm., 579, 580.

[2] Story on Bailm., § 17, 332.

[3] Bracton, 99, b; Jones on Bailm., 76.

[4] Henry de Bracton is supposed to have been a judge or justiciary; his quotations come down to the forty-sixth year of the reign of Henry III. Almost nothing seems to be known of his personal history, notwithstanding he held for a long period so high a place as one of the authorities of the English Law, and was looked up to even as late as the time of Lord Coke as the first source of legal knowledge. He is admitted to have been a master of the common law, and he quotes the Roman code with great freedom; from which he is supposed to have derived his clear, nervous and expressive style. Many of our current maxims came to us through him from the civil law. 2 Reeves' English Law, 88, 90; 2 Ld. Raym., 909; see also Lives of the Chief Justices by Lord Campbell, 1 vol., p. 78.

[5] Jones on Bailm., 119; 2 Kent's Comm., 580.

than his own. This the language and doctrine of Lord Coke;[1] it is explicitly denied by Sir William Jones, who maintains that a bailee cannot be considered as using ordinay diligence if he suffers the goods bailed to be taken by stealth out of his custody;[2] and he argues the question at considerable length, maintaining that the reason given by Coke for his doctrine, namely, "because the pawnee has a property in the goods pledged," is applicable to every other sort of bailment, and proves nothing in regard to any particular species; since every bailee has a temporary qualified property in the things of which possession is delivered to him by the bailor, and has therefore a possessory action or an appeal in his own name against any stranger who may damage or purloin them.[3]

Mr. Justice Story comments upon the argument of Sir William Jones, and contends quite as pointedly that not every bailee has a temporary qualified property in the thing bailed; that neither depositaries, nor mandataries, nor borrowers have any special property in the thing bailed; although as they have a lawful possession and are answerable over, they may maintain an action for any tort done to the thing bailed during the time of their possession; but he concedes that the reason given by Lord Coke is not the true reason.[4] Chief Justice Holt assumes the law to be as stated by Coke, and that even a borrower, is not liable for property stolen, where he has not been guilty of any neglect;[5] and the borrower, as we have seen, is bound to exercise the utmost care. Chancellor Kent considers the rule to be, that the pawnee is neither absolutely liable, nor absolutely excusable, if the pledge be stolen; that it depends upon circumstances, whether he is or is not liable.[6] This agrees with the result arrived at by Mr. Justice Story, that theft *per se*, establishes neither responsibility nor irresponsibility in the bailee. If the theft is occasioned by his negligence,

[1] 1 Inst. 89 a; 4 Rep., 83, b.
[2] Jones on Bailm., 44, 76, 77.
[3] Jones on Bailm., 80.
[4] Story on Bailm., § 333–338, 93–95.
[5] 2 Ld. Raym., 909.
[6] 2 Kent's Comm., 580, 581.

the bailee is responsible; if without any negligence, he is discharged.[1]

Where the promissory note of a third person is deposited by a debtor with his creditor, as collateral security for a debt, such note is a pledge; the pawnee has merely a special property in it; and his authority extends no further than to receive the amount of the note from the maker, and not to compromise with him for a less sum than appears on the face of the note, or to dispose of it in any other manner, until after the pawnor's default in redeeming.[2] The pawnee in such a case is not obliged to take measures to collect the note. Even though there be a conditional sale of the note, if a right of redemption within a specified time is reserved, it will be held a pledge in the hands of the creditor with whom it is deposited; to be kept and returned according to the terms of the contract.[3]

The pawnor retains the right to negotiate or collect the note, provided he discharge the lien of the pledgee before judgment;[4] he may transfer the note to a third person, who may maintain an action on it as indorsee in his own name; but he must redeem before he can have a recovery, because a judgment on it works a merger of the note; the note is merged in and extinguished by the judgment.[5] On this ground a judgment against one of several partners on a promissory note executed by the firm, is held a bar to a subsequent action against the other partners. It extinguishes the original debt, or merges it in a higher security.[6] Hence, to permit the pawnor or his indorsee to prosecute the note deposited in pledge to judgment, without discharging the lien, would be to permit him to wrest from the pawnee his security or interest in the pledge.

[1] Story on Bailm., § 338. A theft may happen without even a slight neglect on the part of the possessor of the chattel; and I think it would be going quite far enough, to hold that such a loss is *prima facie* evidence of neglect, and that it lays with the pawnee to destroy the presumption. *Kent.*

[2] Garlick v. James, 12 John. R., 146.

[3] McLean v. Walker, 10 John. R., 472.

[4] Fisher v. Bradford, 7 Greenl., 28.

[5] Thompson v. Hewitt, 6 Hill R., 254; Pierce v. Kearney, 5 Hill R., 82.

[6] Robertson v. Smith, 18 John. R., 459.

Payment of the debt, for the security of which the pledge is made, restores to the pawnor the right to the immediate possession of the goods bailed; and if the pledgee fail to deliver them on demand, the *onus* of accounting for them is thereby cast upon him.[1] Prima facie he is liable for the goods, because he is bound to redeliver them on the payment of the debt, and the law will not presume that they have been lost without his negligence. The failure to deliver on demand is evidence of a conversion, which must be overcome by evidence that will negative the presumption.[2] If he show them lost, the law will not intend negligence; and the onus is then shifted upon the pawnor. A total default in delivering the goods bailed, on demand, being shown, the bailee must account for them; otherwise he is deemed to have converted them to his own use.[3] The bailee, having the custody of the goods and receiving them in good order, has the means and is bound to show how they have been either lost or injured.[4]

The appropriation by the pawnee of the goods intrusted to him to his own use, is a breach of trust.[5] And so also, if he redeliver the pledge, such as notes deposited with him as collateral security, to the *owner* for the special purpose of having them collected, and he accordingly collects and appropriates the fund to his own use; it is held that he is liable, notwithstanding he holds the general property in them, for the breach of a special trust; and that the demand against him arising thereon is a debt incurred in a fiduciary capacity.[6] Like an attorney, to whom notes or evidences of debt are intrusted for the purpose of collection, he stands in a fiduciary relation to the person who employs and intrusts him with the business. There is in this case a double trust;

[1] 5 Barn. and Cres. R., 322, Marsh v. Horne.

[2] Lockwood v. Bull, 1 Cowen. R., 330; Bissel v. Drake, 19 John R., 66; Kennedy v. Strong, 14 John R., 128; 8 John R., 445.

[3] 2 Salk, 655; 1 Term. R., 33, per Ld. Mansfield; Platt v. Hibbard, 7 Cowen, 497.

[4] Price v. Powell, 3 Comst. R., 322.

[5] Story on Bailm., § 324.

[6] White v. Platt, 5 Denio. R., 269.

the pawnor delivers the notes to the pawnee in trust as collateral security for the payment of his debt, and the pawnee acquires a special property in them, not in any manner subject to the control of the bailor; the pawnee then delivers the notes to the pawnor in trust to collect and return the proceeds to satisfy his lien. The owner becomes a special bailee for a purpose consistent with the pawnee's interest, and as he wrongfully appropriates the subject of the pledge there is no well founded principle which can protect the wrong-doer from an action for the goods.[1] For this is not a voluntary surrender or the goods, and does not terminate the bailment, so as to deprive the bailee of his special property.[2] If the bailee intentionally restore the possession, his interest is gone, and the bailment is at an end; but the legal possession is not changed by a manual delivery to the owner, under a special contract that the property shall be restored after the specified purpose is fulfilled.[3]

In Foot v. Storrs, Mr. Justice Willard lays it down as a rule, that in all cases, where a defendant is bound only to ordinary care, and is liable only for ordinary neglect, the plaintiff cannot recover upon the mere proof of loss of the articles intrusted to the bailee. He must give some evidence of a want of care in the bailee, or his servants.[4] It is well settled that a warehouseman, or depositary of goods for hire, is responsible only for ordinary care, and that he is not liable for loss arising from accident when he is not in default.[5] In Finucane v. Small it was held that where goods are bailed to be kept for hire, and the compensation is paid for house-room and not as a reward for care and diligence, the bailee is only bound to take the same care of the goods as of his own; that if they be stolen or embezzled by his servant, without gross negligence on his part, he is not lia-

[1] Hays v. Riddle, 1 Sand. R., 248; Roberts v. Hyatt, 2 Taunt., 266.

[2] Homer v. Crane, 2 Pick., 607.

[3] Story on Bailm., § 297.

[4] 2 Barb. R., 326.

[5] 2 Kent's Comm., 586; 4 Térm. R., 481; Peake's N. P., 114; 4 Esp. N. P. R., 262.

ble; and that the burden of showing negligence seems to be upon the plaintiff, unless there is a total default in delivering or accounting for the goods.[1] This agrees with the rule of liability as stated by Chancellor Kent: "The bailee, when called upon for the article deposited, must deliver it, or account for his default by showing a loss of it by some violence, theft or accident; when the loss is shown, the proof of negligence or want of due care is thrown upon the bailor, and the bailee is not bound to prove affirmatively that he used reasonable care.[2] The care must rise in proportion to the demand for it; and things that may easily be deteriorated require an increase of care and diligence in the use of them."[3]

A warehouseman, not chargeable with negligence, is not responsible for goods intrusted to him, stolen or embezzled by his store-keeper or servant; and the burden of showing negligence in the case lies upon the owner. The refusal by the bailee to deliver on demand, after the bailment has terminated, or by an attorney, to pay over the moneys collected by him, renders him prima facie liable for the goods bailed, or for the moneys in his hands.[4]

The bailee stands in the relation of a trustee of the property committed to him, and is bound to keep the property with the care and diligence of a provident owner. A trustee of personal property, under a voluntary assignment to him, must exercise the same care and solicitude, that a prudent person, or a man of reasonable and ordinary diligence would use for himself. The rule is not as it is sometimes stated to be, that the trustee must take precisely the same care in behalf of his *cestui que trust* as he would do for himself. The rule does not bend itself to the individual character;[5] and it is held that a voluntary assignment which

[1] 7 Cowen R., 500, note a, and cases there cited; Schmidt v. Blood, 9 Wend. R., 268.

[2] Harris v. Packwood, 3 Taunt. R., 264; Marsh v. Horne, 5 Barn. and Cres., 322.

[3] Kent's Comm., 587.

[4] Rathbun v. Ingalls, 7 Wend. R., 320; Taylor v. Bates, 5 Cowen R., 376; Dunlap v. Hunting, 2 Denio, 643.

[5] Willis on Trustees, 125, 169, 172; Litchfield v. White, 3 Sand. R., 545.

contains a provision exempting the assignee from liability for any losses to the trust fund, unless the same happen by reason of his own gross negligence or misfeasance, is void. The reason of this decision is that the law will not permit a debtor, in failing circumstances, to place his property temporarily beyond the reach of his creditors, in the hands of an assignee, under a less stringent rule of liability than that which the law establishes.

There is no public policy to prevent bailees, other than innkeepers and common carriers, from stipulating for a restricted liability; and hence, a special contract by the bailee for exemption from liability arising from want of ordinary care and skill is valid.[1] The decision of the supreme court, in which this rule of responsibility was applied, was afterwards reversed; but the ground of reversal appears to have been the erroneous application of the principle.[2] It was at first held that the owners of a steamboat, engaged in towing vessels on the Hudson river, were not common carriers; that aside from any express contract they were to be holden to the same rule of responsibility as ordinary bailees for hire; but that where there is evidence of a special contract entered into between the parties offered, it must be submitted to the jury; who, if they find it proved, must find the damages under its stipulations, as in the case of the breach of any ordinary contract.[3] The court for the correction of errors voted to reverse this decision, but could not agree upon the ground of the reversal; Senator Bockee agreed with Chief Justice Bronson, that the owners of the steamboat so engaged, are not common carriers; but disagreed with him on another point, holding that they could not be permitted to stipulate against their liability for the gross negligence of the officers and agents on board of the steamboat; Senators Lawrence, Scott and Rhoades regarded them as common carriers; Senator Porter did not consider them

[1] Alexander v. Greene, 3 Hill R., 9.

[2] 7 Hill R., 533; Caton v. Rumney, 13 Wend. R., 387; East India Company v. Pullen, 1 Strange, 690; Brinde v. Dale, 8 Carr. and Payne, 270; Farnsworth v. Packwood, 1 Holt, 207.

[3] 3 Hill R., 9.

common carriers, but maintained that the contract had not been properly construed; from all which it is evident that this judgment of reversal is not to be regarded as settling any principle of law differently from the manner in which it was held by the court whose judgment was thereby reversed.

Where stocks, deposited in pledge, are sold by the pledgee before the debt to which it is a collateral security, becomes due, it is a violation of his trust, which cannot be remedied by a subsequent purchase of other stock of the same kind and value to be returned in place of that sold.[1] In such a case the pledgee will not be permitted to prove that it is the general usage for the pawnee to hypothecate and dispose of such stock at pleasure; and on payment or tender of the principal debt, to return an equal number of shares of the same stock. Evidence of this usage is inadmissible, because it tends to contradict a written contract.[2]

In like manner a written instrument acknowledging the receipt of a quantity of wheat in store, being a contract of bailment, is not open to contradiction in the sense of the rule applicable to receipts proper.[3] So far as such an instrument is a receipt, in the ordinary acceptation of that term, it may be explained or even contradicted by other evidence; but where it imports a contract, it cannot in that respect be varied by parol evidence, though where its words are ambiguous it may be explained in the same degree as any other written contract. To the like effect, it is held that a memorandum acknowledging the receipt of a quantity of grain on freight, is open to explanation only as a receipt.[4] Though it may be shown that, by a general usage among dealers in

[1] Allen v. Dykers, 3 Hill R., 593; 7 Hill R., 497. In Nourse v. Prime, 4 John. Ch. R., 490, and 7 id., 69, the defendants had at all times the requisite quantity of stock on hand, and it was held that in such a case the law will presume that the stock on hand were the shares deposited.

[2] Le Croy v. Eastman, 10 Modern R., 499.

[3] Cowen and Hill's Notes to Phil. Ev., p. 216, 217, 1439; Goodyear v. Ogden, 4 Hill R., 104.

[4] Dawson v. Kittle, 4 Hill R., 107; Withnall v. Gartham, 6 Term R., 398; Bushforth v. Hadfield, 6 East, 519.

grain, the writing means a sale, it can only be done by full and explicit evidence, such as leaves no doubt that the parties contracted in reference to the usage. The existence, extent and meaning of the usage must be clearly established; the ordinary meaning of the terms employed in the written memorandum must prevail, unless modified by clear proof that these have a particular meaning attached to them by the usage of trade—a usage known to the party at the time of contracting, or which he is presumed to have known and assented to.[1]

If the bailee fail to fulfill the contract under which the bailment is made, he cannot insist upon his lien, nor claim his compensation pro rata to the extent of his performance. Where logs are delivered at a saw-mill on a bailment, to be by a fixed time manufactured into boards on shares, each party to have one-half, and a part only are manufactured, when the bailee converts the whole to his own use, it is held that the bailor may recover for the whole, both logs and boards, and that the miller is not entitled to any deduction on account of what has actually been sawed.[2] The effect of the contract is materially different where the bailee's agreement is to return boards equal in value, to one-half of the boards to be manufactured out of the logs; for this amounts to a contract of sale, under which the price is to be paid in specific articles.[3] If the bailee for hire, such as a warehouseman, is found liable for the negligent injury of goods stored with him, he cannot relieve himself from responsibility or prove in mitigation of damages, that after the happening of the injury, the goods were destroyed without his fault and that they must have been so destroyed even if no damage had previously occurred.[4]

A sale of stock deposited in pledge as a security for a loan of money, with power to sell in case of non-payment, may be made at the board of brokers in the city of New-

[1] Cooper v. Kane, 19 Wend., 386.

[2] Pierce v. Schenck, 3 Hill R., 28.

[3] Smith v. Clark, 21 Wend., 83. This case overrules Seymour v. Brown, 19 John. R., 44; Buffum v. Meny, 3 Mason, 478.

[4] Powers v. Mitchell, 3 Hill R., 545.

York on two days' notice given to the pawnor, if no objection is made to such sale.[1] There does not seem to be any established custom to be observed in such cases; there being no agreement between the parties on the subject, the mode of sale is left to the sound discretion of the pawnee. His neglect to sell the pledge within a reasonable time, cannot be pleaded in bar of an action brought for the recovery of the original debt.[2] But the pawnor may without doubt recoupe his damages in such an action, arising from an improper sale without notice, or any other breach of duty by the bailee injurious or destructive to the pledge.[3]

An accord, not executed, is no bar to a preëxisting demand, but if executed by delivering a collateral thing which is agreed to be accepted as satisfaction, it is a bar.[4] But a pledge cannot be converted into a satisfaction of the original debt, by the pawnee's neglect to sell the pledge; even if he be guilty of such neglect as will give to the pawnor a right of action against him for damages, there is no such thing as setting up one right of action as a bar to another right of action. A recoupment of damages, however, accomplishes very nearly this result in many cases, where there are mutual rights of action existing between the parties arising out of the same transaction.[5]

It seems doubtful whether the neglect of the pawnee, for a number of years, to sell stocks deposited with him as collateral security, will be regarded as rendering him liable for their loss or depreciation.[6] As the pawnor has at any time the right to pay the debt secured by the pledge, and thus repossess himself of the stock, it would seem that he ought not to be permitted to complain that the pledge is retained for the exact purpose for which it was made.

[1] Willoughby v. Comstock, 3 Hill R., 389.

[2] Taggard v. Curtenius, 15 Wend. R., 155.

[3] Stearns v. Marsh, 4 Denio R., 227.

[4] Boyd v. Hitchcock, 20 John. R., 76; Le Page v. M'Crea, 1 Wend. R., 172; Booth v. Smith, 3 Wend. R., 66; Hughes v. Wheeler, 8 Cowen R., 77; Anderson v. Highland Turnpike Co., 16 John. R., 85.

[5] Batterman v. Pierce, 3 Hill R., 171.

[6] 15 Wend. R., 155; Perry v. Craig, 3 Mis., 516.

The pawnee, receiving a pawn or mortgage as a security for several debts, must apply the proceeds derived from a sale of the goods pledged in equal proportion to the discharge of every one of the debts, with this qualification, that the interest thereon is to be first paid, and the balance appropriated. If the debts secured by pledge be contracted at different times, and the pledge is deposited as a security for the first, with a subsequent agreement that it shall be retained as a further security for the others, the proceeds derived from the sale must be applied to the payment of the debts in the order in which they were contracted; for it is presumed that the pawnor pledged for the security of the debts last contracted only what remained of the pledge after payment of the first.[1]

If a debtor owe his creditor several debts upon distinct causes, and pays him a sum of money, he (the payor) has a right to say to which debt or debts the money shall be appropriated, provided he directs this at the time of the payment; but if he does not so direct, the creditor may apply it as he pleases; where the debts are of different characters, and neither party applies the payment at the time, the law will apply it, upon the presumed intention of the debtor, to that debt, a relief from which will be most beneficial to him. There being several debts and one of them secured by a mortgage, the law will appropriate a general payment to the discharge of the mortgage debt, because that is supposed to bear most heavily on the debtor. The civil law applied a general payment under such circumstances on the same principle,[2] first to the most burthensome debt; to one that carried interest, rather than to that which carried none; to one secured by penalty or pledge, rather than that which rested on simple stipulation; and if the debts were equal, then to that which had been first contracted.[3]

[1] Pattison v. Hull, 9 Cowen R., 747, 776, note b.

[2] 9 Cowen R., 768; 12 Mod. R., 559; 1 Ld. Raym., 286; 1 Comb., 463; Peake, N. P. Cases, 64; 1 Har. and John., 754; 2 id., 402; 8 Mod. R., 236.

[3] Herkimer M. and H. Co. v. Small, 2 Hill R., 127; Pierre v. Roberts, 2 Cas. in Ch., 83, 84; Blackstone Bank v. Hill, 10 Pick., 129, 131.

The bailee is held to a strict compliance with the terms of his contract, and is bound to apply the proceeds of the sale of a pledge in an equitable manner. If, having two demands against a debtor, he receives a third person's note as security for one, and a pledge of property as security for both, and afterwards sells the property for enough to pay both debts, he cannot pay over a part of the avails of the sale to his debtor, and then maintain an action on the surety's note.[1] The surety's note, being given as collateral security for the pawnor's debt, can be collected only on his failure to pay; and the law will not permit the pawnee, who has received from a sale of his debtor's property a fund sufficient to satisfy his demand, thus to pay over a part of it, that he may again collect it of a mere surety.

The receipt of a pledge in security for a debt does not suspend the creditor's right of action; even where he has received a good note of a third person, of a greater amount than his own claim, as collateral security, he may still maintain an action on his own debt, without previously restoring the note received as collateral.[2] The summary procedure by attachment, for the collection of debts allowed under the laws of Vermont, is not deemed a sufficient reason for a departure in this respect from the rule of the common law. The contract of pledge, being a new and distinct engagement, does not modify the creditor's rights; and hence if he receive from his debtor an accommodation note, made by a third person for another purpose, as collateral security for a preëxisting debt, he cannot enforce its collection; because, not receiving it for value within the mercantile usage, he acquires no better title to it than the person has from whom he receives it.[3]

Where, in a mortgage of property, consisting of pews in a church, subject to the liens of the society thereon, a party

[1] Strong v. Wooster, 6 Verm. R., 536.

[2] Chapman v. Clough, 6 Verm. R., 123.

[3] Bank of St. Albans v. Gilliland, 23 Wend. R., 311; Rogers v. Morton, 12 Wend., 484; 14 Wend., 575; Smith v. Van Loan, 16 Wend. R., 659; 9 Wend. R., 170; Codington v. Bay, 20 John. R., 637; Stalker v. McDonald, 6 Hill R., 93; Keutgen v. Parks, 2 Sand. R., 60.

acknowledges his indebtedness to another in a sum certain, and for the purpose of securing the payment thereof, transfers the property specified in the instrument, the creditor, in default of payment, may bring his action thereon and is not bound in the first instance to resort for satisfaction to the property.[1] The acknowledgement of the indebtedness implies a promise to pay, and the creditor is not bound to exhaust the property mortgaged by way of pledge.[2] Though he is not compelled to do so, the creditor is at liberty to proceed to collect the amount of his debt out of a collateral security deposited with him.[3] He may proceed to a judgment on the bond of a third person, given as collateral security for money due upon a note, without discharging either the maker or indorser of the note. There being no legal agreement for delay, the indorser is not released by an omission, after protest, even for a considerable time to collect the note;[4] nor is he discharged by the taking of a higher security, such as a bond, as collateral to the note.[5]

A note made generally for the purpose of raising money on it, but payable to a particular bank where the parties suppose it is to be discounted, may be deposited in pledge, by the person for whose benefit it is made, for a loan of an equal sum of money; and even a recovery of a judgment against the borrower for the amount of money lent, is no bar to an action on the note; for the note is to be treated as a collateral security for the payment of the sum advanced.[6] So where one of three joint covenantors, gives a bill of exchange for part of the debt secured by the covenant, and a judgment is recovered on the bill, such judgment is no bar to an action of covenant against the three. The note or bill of exchange, not being accepted in satisfaction for the debt, operates only as a collateral security; and though judg-

[1] Elder v. Rouse, 15 Wend. R., 218. Such property is not a legal interest in the freehold; 16 Barb. S. C. R., 237.

[2] Kimball v. Huntington, 10 Wend. R., 675.

[3] Sterling v. the M. and S. Trading Co., 11 Serg. and Rawles, 179.

[4] Powell v. Waters, 17 John. R., 177; Bank of Utica v. Ives, 17 Wend. R., 501

[5] Day v. Leal, 14 John. R., 404; Sizer v. Heacock, 23 Wend. R., 81.

[6] Bank of Chenango v. Hyde, 4 Cowen R., 567.

ment has been recovered on it, yet not having produced satisfaction in fact, the creditor may still resort to his original remedy on the covenant.[1] The transfer of a note, or account, draws after it a pledge or collateral security given for its payment; for such a security is specific and can be applied to no other object; and unless voluntarily relinquished, it is deemed to follow the original debt.[2]

The rule is that the pawnee, who sells the pawn, or collects on the collateral security intrusted to him, is entitled to receive or recover the full amount or value of the chattels or choses in action deposited in pledge, and apply the proceeds first to the payment of his debt; that satisfied, and the balance belongs to the pawnor.[3] If he elects to realize on the security deposited with him, after his debt becomes due, by proceeding to sell on notice, or to collect where a chose in action is pledged, the fund comes into his hands, and must after the payment of his debt, be held in trust for his debtor. There are, however, cases where he cannot collect beyond the amount of his debt; indeed if the goods bailed are capable of being divided so as to be sold in parcels, his right to sell cannot extend beyond realizing the amount of his debt. But in some cases the things pledged do not belong to the pledgor, and in these the contract of bailment must be executed with a due regard to the rights of the surety and third parties. Thus, one to whom a promissory note is transferred before it becomes due as collateral security for indorsements to be made by him, which are afterwards made, and who takes the note without notice of any defence existing against it in the hands of the person from whom he receives it, on the ground of its being accommodation paper created for another purpose, is entitled to be treated as a bona fide holder in the commercial sense. But he cannot recover upon the note beyond the indorsements against which it was designed to secure him.[4]

[1] Drake v. Mitchell, 3 East, 251.
[2] 2 John. Ch. R., 418; 7 Howard Pr. R., 401.
[3] Story on Bailm., § 312, 313.
[4] Williams v. Smith, 2 Hill R., 301.

If the owner of the thing pledged be not the debtor, but consent to the making of the bailment to secure the payment of another person's debt, he is to be treated, it should seem, as standing in the situation of a surety.[1] And a surety is entitled to be subrogated to all the rights and remedies of the creditor whose debt he is compelled to pay, and to any fund, lien or equity which the creditor had against any other person or property on account of such debt. And his equitable right of substitution is not lost, except as against bona fide purchasers and mortgagees, by the extinguishment of the lien of the creditor, at law, by the payment of the debt by the surety, or out of his property.[2] On paying the debt, the surety is entitled to stand in the place of the creditor, clothed with, or in legel phrase, subrogated to all his rights against the principal.[3]

Expenses, by whom borne.

On his part, the debtor is bound under the rule of the civil law, to pay to the creditor all the useful and necessary expenses which the latter has incurred for the preservation of the pledge.[4] And it is said that where the pawnee is at any expense to maintain the thing given in pledge, as, if it be a horse or cow, he may ride the horse moderately, and milk the cow regularly, by way of compensation for the charge; and this doctrine ought, it seems, to be equally applicable to the general bailee, who should neither be injured nor benefitted in any respect by the trust undertaken by him; but the Roman and French law, more agreeably to principle and analogy, permits, indeed, both the pawnee and depositary to milk the cows delivered to them, but requires them to account with the respective owners for the value of the milk as well as the increase of the cattle, deducting the reasonable charges for their nourishment.[5]

[1] Strong v. Wooster, 6 Verm. R., 536; King v. Baldwin, 2 John Ch., R., 554.
[2] Eddy v. Traver, 6 Paige, Ch. R., 521.
[3] 2 John Ch. R., 554.
[4] Code of Louisiana, art. 3134.
[5] Jones on Bailm., 82; Coggs v. Bernard, 2 Ld. Raym., 909.

There is every reason why the pawnee should be entitled to recover the necessary expenses imposed upon him in the discharge of his duty in the keeping of the pledge; or in rendering it a valuable and available security. Where an indorsed note, not yet due, is deposited as a collateral security, the pawnee is bound to have it duly protested, and to do those acts which will preserve the liability of the indorser; and surely there can be no reason why he should not be permitted to demand the expenses incurred by him in so doing.[1] So also it is held that the pledgee must account for the rents and profits of the thing pledged; which assumes that the bailee is bound to exercise due diligence to collect and preserve them; a duty for the performance of which he ought to be entitled to receive a reasonable compensation.[2] Though the civil law allows the compensation for all charges and expenses, necessarily incurred in the preservation of the pawn, at common law the point does not appear to have been decided.[3]

Chancellor Kent asserts that the common law requires the pawnee to account for all the income, profits and advantages derived by him from the pledge, in all cases where such an account is within the scope of the engagement, after deducting his necessary charges and expenses.[4] It is reasonable that these charges and expenses should be deducted from the profits of the pledge; and even extraordinary expenses, necessarily incurred by the pawnee for the preservation of the pledge, and without his default, ought to be borne by the pawnor.[5]

It is held that where a negotiable security is taken as collateral to an existing debt, the holder may endeavor to make it available by a suit; and, failing of success, may resort to his original security, without restoring that taken as col-

[1] Russell v. Hester, 10 Ala. R., 535.

[2] Honton v. Holliday, 2 Murph., 111.

[3] Story on Bailm. § 306, 307, 357, 358.

[4] 2 Kent's Comm., 578, 9. Chancellor Kent quotes Mr. Justice Story as his authority, and *he* seems to concede that the point has not been passed upon at common law.

[5] Mores v. Conham, Owen's R., 123.

lateral. In such a case, may he recover the costs of his suit on the collateral security?[1] Where a note is received, the proceeds to be collected and applied by the creditor to the discharge of his debt, he is bound to use due diligence to collect the note and give notice of non-payment.[2] The pledge is made for the mutual benefit of the parties to the contract; and the collection, or the effort to collect the collateral security is as much for the benefit of the debtor as it can be for the creditor. Besides this, the creditor is legally entitled to recover and realize the face of his demand, after deducting incidental expenses; and though it may be presumed that he willingly undertakes the personal trouble and care of the collection, it can hardly be inferred that he also assumes to pay the actual costs and disbursements of the prosecution; for that would be to cast upon him another man's burden.

The bailee is bound only for the use of ordinary care of the goods bailed to him by way of pledge; and if for their preservation from fire or flood or other injury, he go to some extraordinary expense, such as removing them from the scene of danger, he ought clearly to be indemnified for at least his actual expenses.[3]

Accessorial things.

As the pawnee acquires only a special property or interest in the pledge as a security, he is bound to account to the pawnor for the profits, income or increase of the pledge.[4] Where a slave is pledged to secure the payment of a sum borrowed, the pawnee is responsible for the profits derived from the slave beyond the interest of the debt; the principal being paid.[5] But he is responsible for the usual hire only, and not for what was actually realized from the labor of the

[1] Comstock v. Smith, 10 Shep., 202.
[2] Foot v. Brown, 2 M'Lean, 369.
[3] Story on Bailm., § 357.
[4] 2 Kent's Comm., 578–9.
[5] Honton v. Holliday, 1 Car. Law Rep., 87.

slave.[1] So also in the case of a mortgage, the mortgagee is bound to account for the profits of the slaves mortgaged, after deducting the expenses of keeping and improving them.[2]

One, who by hiring for a term becomes temporary proprietor of flocks or cattle, acquires the right to their natural increase;[3] for that is in part the object for which he hires them. But the pledgee receives the chattels only as a security, and does not acquire any right to the increase of the things bailed. Where stocks are pledged as collateral security for an existing debt, the pawnee must account for the dividends received thereon; but he is entitled to retain them under the same terms, under which he holds the principal thing pledged.[4] The interest, or income derived from the pledge, ought properly to be applied to the payment of the interest accruing on the original debt, and after that to the payment of the principal. The interest accruing on the debt secured, is but an incident to it, and a legal increase of the demand, which is equally covered by the pledge.[5] And so too, the interest accruing on the pledge is but an incident to it, and a legal increase of the security. If the pledge consist of a bond bearing interest, deposited as collateral security for the payment of another debt, the pawnee must account for the interest paid thereon, and he is at liberty to apply the amount so received to the payment of his own debt.[6]

In this respect, the civil does not appear to differ from the common law. The fruits of the pledge are deemed to make a part of it, and therefore they remain, like the pledge, in the hands of the creditor; but he cannot appropriate them to his own use, and he is bound on the contrary, to give an account of them to the debtor, or to deduct them from

[1] Davenport v. Tarlton, 1 Marsh., 244; Ratcliff v. Vance, 2 Rep. Con. Ct., 239.
[2] Ross v. Norvell, 1 Wash., 14.
[3] Putnam v. Wyley, 8 John. R., 532; Wood v. Ash, Owen R., 138.
[4] Hasbrook v. Vandervoort, 4 Sand. R., 74.
[5] 2 Kent's Comm., 583, 584.
[6] 4 Sand. R., 74.

what may be due to him.[1] If it is a debt on credit which has been given in pledge, and if this debt brings interest, the pawnee shall deduct this interest from those which may be due to him; but if his own debt, for the security of which the claim has been given, brings no interest by itself, the deduction shall be made on the principal of the debt.[2] So, also, if the debt which has been given in pledge, becomes due before it is redeemed by the person pawning it, the creditor and pawnee by virtue of the transfer which has been made to him, is justified in receiving the amount, and in taking measures to recover it. When received, he must apply it to the payment of the debt due to himself, and restore the surplus, should there be any, to the person from whom he held it in pledge. As the title to the pledge does not pass, it is but a necessary conclusion, both of reason and law, that its fruits should accrue to the owner; for it is the law of property that it shall labor for and contribute to its proprietor.[3] Lands labor for him in the return of an annual rent; stocks, in the dividends which they yield; and notes and bonds, in the interest which they bear, as the regular fruitage of the year.[4]

In contracts for the payment of a sum of money certain on a prescribed day, the law holds that the debtor, in case of default in payment must pay interest from the day payment should have been made; interest is the legal compensation or damage allowed for the use of the money or the detention of the debt. The creditor can acquire nothing beyond his debt by the taking of goods or choses in action as a pledge; and neither does the pawnor surrender his right to the income and profits of personal property, which he merely deposits as a collateral security for another engagement. If the pledge consist of a debt that draws interest, the interest and the debt being inseparable, must both go to the credit of the

[1] Code of Louisiana, art. 3135.

[2] Same code, art. 3136, 3137.

[3] Story on Bailm., § 292, 343.

[4] Taylor's Landlord and Tenant, 231; Van Rensselaer v. Jewett, 5 Denio, 135; 2 Comst. R., 135.

pawnor.[1] This is so plainly the result of established principles that it is scarcely capable of being fortified even by judicial decisions.

Parties.

All persons, having a legal capacity to contract, may enter into the contract of pledge. The same qualifications are required in this, as in other agreements, to render parties competent to contract; and there are the same exceptions.[2] Idiots, lunatics, habitual drunkards, infants and married women, as a general rule, are incompetent to make or receive a valid pledge. But the contract of an infant is not void; and no man is to be presumed incapable of contracting.[3] The fact of incapacity must be established by evidence; the finding of one a lunatic, on a commission of lunacy, prima facie renders his subsequent contracts void. Until the incapacity is established, the presumption is that every one is capable of making a valid agreement. And after the incapacity is once established by the finding of a jury, the presumption is that it continues, until it is rebutted by positive testimony.[4]

It was at one time held that a man shall not be allowed to stultify himself,[5] by pleading either idiocy or lunacy. But the rule has been modified, so as to conform to the universal sense of natural justice;[6] and it is now settled that all persons afflicted in this manner are incapable of making a valid contract. But the incapacity is to be established by the person who seeks to make it the ground of his action or defence. Being an exception to the general rule, the proof lies with him who alleges it. Till the contrary appears, sanity is to be presumed; but after a general derangement is shown, it is then incumbent on the one who insists that the act is

[1] Reid v. Rensselaer Glass Factory, 3 Cowen R., 393, and 7 id., 587.

[2] Story on Bailm., § 302.

[3] Story on Con., § 34 to 47, 48 to 82 and to 110.

[4] Jackson v. King, 4 Cowen R., 207; Jackson v. Van Dusen, 5 John. R., 144.

[5] 4 Co., 123; Co. Litt., 147.

[6] Thompson v. Leach, 3 Mod. R., 301; Ball v. Marvin, 3 Bligh, N. S. 1; Rice v. Peet, 15 John. R., 503.

valid, to show sanity at the very time when it was performed.[1]

Infancy, as we have seen, is a personal privilege, which no one but the infant can take advantage of.[2] His contracts, though voidable at his election, are binding on all persons who contract with him. In avoiding his contracts he must, however, deal equitably; and if he avoid an executed contract, he must restore the consideration received.[3] If he disaffirm a sale of personal chattels, the vendee may sue for and recover the consideration; for the law does not allow him to use his privilege as an instrument of fraud or injustice.

Under the recent statutes, giving to a married woman the right to take and hold real and personal property, to her sole and separate use, as if she were a single female, and to receive the rents, issues and profits thereof, free from the disposal and control of her husband, a limited power to contract, must, it seems, be implied.[4] Taken together, they evidently contemplate that she shall manage and control her own property; which can hardly be done without the legal capacity to bind herself by contract.[5] If she is authorized to collect the rents and profits of an estate, it would seem to follow that she must also be invested with the right to enter into such collateral contracts as may be incident to the business. But it is not necessary to enter into this subject more at length. Every species of contract requires that the parties contracting, shall be legally competent to enter into the engagement; and the contract of pledge stands on the same footing in this respect with others.

[1] 4 Cowen R., 207.

[2] Willard v. Stone, 7 Cowen R., 22.

[3] Roof v. Stafford, 7 Cowen R., 179.

[4] Session Laws of 1848, p. 307; do. of 1849, p. 528; Blood v. Humphrey, 17 Barb. R., 660.

[5] Holmes v. Holmes, 4 Barb. R., 295. The opinions are not uniform on this subject. Switzer v. Valentine, 10 Howard's Pr. R., 109; 3 American Law Register, 385; 7 Paige Ch. R., 14; 20 Wend. R., 570; Dickerman v. Abrahams M. S. opinion by Mr. J. Harris; the married woman has a power of appointment in relation to her separate estate.

Contract, when void.

Under the Code of Louisiana, every lawful obligation may be enforced by the auxiliary obligation of a pledge. If the principal obligation be conditional, that of the pledge is confirmed or extinguished with it. If the principal obligation is null, so also is the pledge.[1]

Under the common law, it has been held that where a person borrows money at usurious interest, which the contract does not exhibit on its face, and gives a pledge for its repayment, he cannot treat such contract as void, and sue for the recovery of the pledge, without a tender of the money actually due, with legal interest thereon.[2] This decision appears to have been made upon the equitable principle that a party cannot entitle himself to relief from an usurious contract by a civil remedy, as by maintaining an action for the pledge, unless he tender all the money really advanced.[3] After payment of a debt tainted with usury, the money actually due cannot be recovered back, though its collection may be resisted;[4] and the giving of a pledge is placing the power of collecting or realizing the debt directly in the hands of the creditor, so that it may be regarded in some sense as a quasi payment. Hence a court of equity, when called upon to give relief against an usurious contract, will, in some cases, require of the party seeking relief that he return the sum actually lent. One who asks for equity must do equity; and the borrower cannot be equitably entitled to keep the money which he has actually received from the lender, and for which the lender has received no consideration.[5] On this ground the court of chancery uniformly refused its aid on a bill of discovery, except upon the condition that the party seeking it should refund the sum actually received by him, with legal interest.

[1] Code, art. 3103, 3104, 3105.

[2] Causey v. Yates, 8 Humph., 605. This case was decided under the statute of Tennessee, which does not declare the usurious contract void. See 20 Eng. Com. L. R., 60.

[3] Fitzroy v. Gwillim, 1 Term R., 153.

[4] 2 R. S., 56, 3d ed.

[5] Livingston v. Harris, 11 Wend. R., 329.

Our statutes against usury remain now substantially as they stood before the revision of 1830: the changes proposed by the revisors, which would have created a consistent and harmonious system, were nearly all of them rejected by the legislature. The eighth section of the present act was among the amendments then proposed and adopted; and this section, it is held, does not abrogate the previously established principal, that on the filing of a bill of discovery, alleging usury, the complainant must pay or offer to pay the principal, or the sum actually lent.[1] The latter clause in this same section, forbidding a court of equity to require or compel payment on deposit of the principal sum as a condition of granting relief, applies only to cases where the complainant, although he can prove the usury without resort to the oath of the lender, has no opportunity of setting up the defence in consequence of the nature of the securities given by him; as for instance, a bond and warrant to confess a judgment, or a mortgage with a power to foreclose under the statute. As a general rule, where the complainant has no legal evidence of the usury, and seeks to compel the defendant to admit or disclose the fact, courts of equity will not compel an answer upon oath, and thus force the defendant to give testimony against himself, where his answer may subject him to a criminal prosecution, to a forfeiture or to a penalty. The plaintiff, in such a case, is bound to waive the forfeiture and pay the amount actually loaned, not only because that is just and equitable, but in order to guard against the possibility of the defendants's answer being made the means of subjecting him to a loss in the nature of a forfeiture.

It is doubtful whether the pledgee, who has received goods in pledge as a collateral security for the payment of an usurious debt, can defend himself against an action at law brought for their recovery. By our statute all deposits of goods, or other things whatsoever, whereby there shall be reserved, taken or *secured* a greater than the established

[1] Livingston v. Harris, 3 Paige Ch. R., 528; 10 Wend., 588.

rate of interest, are rendered void.[1] Where an auctioneer received goods in deposit on an usurious loan from one who had acquired them fraudulently, it was held that he was not entitled to be considered as a bona fide purchaser in an action brought against him for the goods by the party from whom they were obtained. The taint of usury destroys the good faith of the transaction and renders him liable.[2] So where an agent, intrusted with a negotiable note for the purpose of procuring it to be discounted, pledged it with a stranger for money loaned to him for his own use, at usurious interest, it is adjudged that the lender cannot avail himself of the great doctrine of the law merchant, that the holder of a negotiable note, who has received it in good faith for value, before its maturity, may retain it against the whole world. The transaction, being illegal, for usury, the lender cannot retain the note against the true owner, because he has not received the same in good faith in the usual course of trade.[3] He cannot be a bona fide purchaser on usury; nor can that be said to be done in good faith, or in the usual course of trade, which is done contrary to the positive prohibition of a statute, and which the statute declares to be void.

As to personal property, if its owner has not conferred upon the vendor the apparent right of property or right of disposal, the purchaser will not be protected against the claims of the true owner, though he has purchased the property for a fair and valuable consideration, in the usual course of trade, without notice of any conflicting claim or suspicious circumstances calculated to awaken inquiry, or put him on his guard. But if the owner has conferred the apparent right of property upon the vendor, even by a sale that may be avoided for fraud, and a delivery of the possession; or if he has furnished the vendor with the external indicia of title, such as a bill of lading sent to a consignee; or if he has

[1] 2 R. S., § 5, p. 56, 3d ed.

[2] Ramsdell v. Morgan, 16 Wend. R., 574; Chapman v. Black, 2 Barn. and Ald., 588.

[3] Keutgen v. Parks, 2 Sand R., 60.

delivered the possession of the property to a person whose common business it is to sell such goods; the person so intrusted with the apparent right to sell, may confer a valid title to one, who buys in the usual course of trade, for a fair and valuable consideration.[1] It is a fundamental principle of our law of personal property, that no man can be divested of his property without his own consent; and, consequently, even the honest purchaser under a defective title cannot hold against the true proprietor. There must be either title or an authority to sell, in the vendor, in order to make a valid sale.[2] By parting with his property to a vendee, who obtains it fraudulently, on a sale that may be avoided for fraud as between the parties to the contract, the owner arms the vendee with such a right to sell as will prevent him from following and retaking the property from the hands of subsequent bona fide purchasers for value.[3]

At law the principle is a sound one that whatever satisfies or renders invalid the original debt, will equally discharge such a collateral undertaking as a pledge, given for its payment;[4] unless, indeed, it should be held that the court will not aid the pawnor to recover back a security which he has voluntarily parted with for value received. A borrower, who has paid usurious interest, may even at common law recover back the excess of interest; but to entitle him to maintain his action, he must show that he has paid, or offered to pay, all the principal really lent, with the lawful interest. Perhaps, on a like equitable principle, it should be held that the borrower ought not to be permitted to recover back his pledge without restoring the principal with legal interest; for though the pledge is not a payment, it is a means of paying the principal debt.[5]

A pledge made upon condition, must be restored as soon as the condition is fulfilled; but a pledge for the payment

[1] Saltus v. Everett, 20 Wend. R., 267.

[2] Mowry v. Walsh, 8 Cowen R., 243.

[3] Root v. French, 13 Wend. R., 572; McCarty v. Vick, 12 John. R., 348; Lickbarrow v. Mason, 2 Term R., 63; 5 Term R., 367.

[4] Story v. Wooster, 6 Verm. R., 536; Russell v. La Roque, 13 Ala. R., 139, 790.

[5] Wheaton v. Hibbard, 20 John. R., 290.

of a debt, is not released or affected by a part payment. If the original debt or engagement be conditional, the pledge, which is but collateral to it, assumes the same conditional character.[1]

Sale of Pledge, when and how made.

On a failure by the pawnor to pay the debt or discharge the obligation for which the pledge is given, the pawnee may file a bill in equity for a foreclosure and proceed to a judicial sale; or he may sell without judicial process, upon giving reasonable notice to the pledgor to redeem, and of the intended sale.[2] The right to redeem continues until the sale; and the sale cannot be made until after the debt secured by the pledge has become due.[3] The non-payment of the debt does not work a forfeiture, either by the civil or at the common law. It simply clothes the pledgee with authority to sell the pledge and reimburse himself for his debt, interest and expenses; the residue of the proceeds belong to the pledgor. The old rule, existing in the time of Glanville, required a judicial sentence to warrant a sale, unless there was a special agreement to the contrary. But it is now settled that the pawnee may sell on a reasonable notice to the pawnor.

But this notice must be a personal notice; and if the pawnor cannot be found so as to be served with such notice, judicial proceedings must be had, in order to authorize a sale.[4] Before giving such reasonable and personal notice, the pledgee has no right to sell the pledge; and if he do, the pledgor may recover the value of it from him, without tendering the debt; because by the wrongful sale the pledgee incapacitates himself to perform his part of the contract, that is to return the pledge, and the law does not demand a

[1] Holbrook v. Baker, 3 Greenl. R., 96; D'Wolf v. Harris, 4 Mason R., 515; United States v. Hooe, 3 Cranch R., 73; Stevens v. Bell, 6 Mass. R., 339; 7 Cranch R., 34.

[2] Cortelyou v. Lansing, 2 Caines' Cases in Error, 200.

[3] Stearns v. Marsh, 4 Denio R., 227.

[4] 2 Stor. Com. on Eq., § 1008; Garlick v. James, 12 John. R., 146.

tender that would be nugatory.[1] The pawnor must be first called upon to redeem, to the end that he may prevent a sale, or at least have an opportunity to take care that the property is not sacrificed. The duty of the pawnee to call upon the pawnor to redeem and give him notice of the time and place of sale, is the same whether the pledge is made before or after the debt becomes due.[2] In the old books they took the nature of a pledge to be such, that it ought to be delivered at the same time that the money was lent or the debt contracted; and if the goods were not delivered at the same time, in security for the debt, the delivery was not regarded as a pledge.[3] But no such distinction is now recognized; and the rule is the same in respect to the rights of the pledgee, as well as his duties connected with the sale, in either case.[4]

The right to redeem under a mortgage of personal property, may, in like manner, be foreclosed by the mortgagee, without judicial proceedings, by a sale of the property, upon reasonable notice to the mortgagor.[5] The tender of the money due on the mortgage, after forfeiture, does not operate to reinvest the title in the mortgagor, but tender and acceptance has that effect;[6] for that is a waiver of the forfeiture. Under the mortgage the title passes, subject only to the condition of defeasance; so that, as soon as the forfeiture has taken effect, the title at law is perfect in the mortgagee; but there still remains a right of redemption, which can be enforced in equity, and may be foreclosed by a sale on reasonable notice.[7]

Under the English law the pawnee, after his debt becomes due, has an election, whether to file his bill in equity, and obtain a judicial foreclosure and sale of the pledge, or proceed at once to sell, on giving reasonable notice to the debtor

[1] McLean v. Walker, 10 John. R., 472; and 2 Caines' Cases in Error, 200.
[2] 4 Denio R., 227.
[3] Bac. Abr., Bailment, B.
[4] 4 Denio, 227.
[5] Patchin v. Pierce, 12 Wend. R., 61,
[6] Brown v. Bement, 8 John. R., 96; Barrow v. Paxton, 5 John. R., 258.
[7] 12 Wend. R., 61; 2 John. Ch. R., 100; Powell on Mortgages, 1041.

to redeem.[1] The pawnor has no occasion, as a general rule, to come into a court of equity for the redemption of goods deposited in pledge. On the payment of his debt, he has a legal remedy for the recovery of the pledge; but the pawnee, though he is not bound to bring his action in equity to foreclose the right of redemption, may do so if he so elect; and Mr. Justice Story considers a judicial sale most advisable in all cases where the pledges are of large value, on the ground that courts watch any other sale with uncommon jealousy and vigilance; and any irregularity may bring its validity into question.[2] The practice is very general to adopt the prompt and easy remedy of selling on reasonable notice.[3]

Under the Code of Louisiana, the pawnee cannot, in case of failure of payment, dispose of the pledge, but must apply to the judge to order that the thing shall remain to him in payment for as much as it shall be valued at by two appraisers, or that it shall be sold at public auction, at the choice of the debtor; and every agreement authorizing the creditor to appropriate the pledge to himself, or to dispose thereof without such formalities, is void.[4] This agrees with the Code Napoleon; but in the other states, where the common law prevails, the pawnee is allowed to sell at his discretion, being held responsible, at his peril, to deal fairly and justly with the pledge.

Though the contract of pledge give to the pawnee the right to sell without notice, he cannot sell until he has first demanded payment of the debtor. And the rule is the same, although the debt is payable presently and without demand, and notwithstanding, by the terms of the pledge, the creditor may sell at public or private sale, without giving notice to the debtor.[5] The conveyance of the title to a chose in action, when that is done as a means of delivering the possession and

[1] Demandray v. Metcalf, Prec. in Chan., 419; 1 Gilbert's Eq. R., 204; Kemp v. Westbrook, 1 Ves., 278; Tucker v. Wilson, 1 P. Wms. R., 261; 2 Kent's Comm., 582.

[2] Story on Bailm., § 310,

[3] 2 Kent's Comm., 583.

[4] Code, art. 3132.

[5] William v. Little, 2 Comst. R., 443.

perfecting the pledge, does not confer upon the pawnee any greater or more perfect right of sale. Stocks deposited as collateral security, though conveyed absolutely, are deemed and treated as a pledge, which may be redeemed at any time before sale, and cannot be sold without a previous demand of the debt, for whose payment it is given as a collateral security.[1] The law requires a demand of payment, to the end that the pawnor may have an opportunity to redeem; he may waive the notice of sale, but that does not dispense with the legal necessity of making a demand of payment.

The difference between a mortgage and a pledge of goods or choses in action, is marked and easily understood, but in practice it is often somewhat difficult to decide whether the contract entered into is to be treated as a mortgage or a pledge. The general distinction between them is, that in a mortgage the title is conveyed with a condition of defeasance, that is to say, a condition rendering the conveyance void, on the payment of a certain sum or sums of money, on or before the day agreed upon; while in a pledge, the goods bailed are deposited as a collateral security, and only a special property is transferred to the pawnee, the general title to the property in the meanwhile remaining with the pawnor.[2] In respect to goods and chattels personal, this distinction is very plain; but there is a large class of cases where the contract still remains a pledge, notwithstanding the title is conveyed.[3] Choses in action cannot be otherwise delivered as a collateral security, and hence as to these and such incorporeal property as cannot be passed from one to another by delivery, the fact that the title passes does not, as has sometimes been held,[4] create a mortgage. Whether the contract shall be held a mortgage or a pledge, is not determined by that fact alone; the title must be conveyed, in order to create a mortgage, but it is not a mortgage simply because

[1] 4 Denio, 227; 2 Comst. R., 448; 1 Sand. R., 351.

[2] 1 Cowen's Tr., 340, 3d ed.; 5 John. R., 258, 261; 5 Cowen R., 323; 2 Aik. R. 115.

[3] Wilson v. Little; 2 Comst. R., 443.

[4] Huntington v. Mather, 2 Barb. R., 538.

the title is conveyed. To create the contract of pledge there must be a delivery of possession, or a conveyance of title, that draws to itself the possession; while a mortgage of chattels or choses in action, is sometimes valid without such delivery.[1]

Though the transfer of stocks be absolute, still if its object and character are qualified and explained by a cotemporaneous paper, which forms a part of the contract and declares it to be a deposit of the stock as collateral security for the payment of a loan, and there is nothing in the contract to work a forfeiture of the right to redeem or otherwise to defeat it, except by a lawful sale under the power expressly conferred in the agreement, the transaction will be regarded as a pledge. The intention of the parties and the real effect of their agreement are to be considered and respected in its enforcement.[2] The use of the terms, "I hereby pledge and give a lien on," in a contract giving security upon a chattel for the payment of a debt on a future day, permitting the possession to remain with the debtor and providing that on the non-payment of the debt the creditor may take possession, does not prevent the instrument from being treated as a chattel mortgage; and a bill of sale, absolute on its face, if executed as a security for the payment of a debt to become due, is held a mortgage that may be defeated by a payment of the debt when it becomes due.[3] The purport and substance of the contract determines whether it shall be considered a mortgage or a pledge. The delivery of a thing, in part execution of a contract, with a stipulation that it may be redeemed on certain terms within a given time, as by the payment of a a stipulated sum of money, creates a pledge.[4]

Both the pledge and the mortgage of goods and choses in action are incident and accessory to the original debt or

[1] Allen v. Dykers, 3 Hill, 593, and 7 id., 498.

[2] Langdon v. Buel, 9 Wend. R., 80; 5 John. R., 258; 9 Wend. R., 345; Brown v. Bement, 8 John. R., 96; Ackley v. Finch, 7 Cowen R., 290.

[3] 8 John. R., 96; Barrow v. Paxton, 5 John. R., 258.

[4] M'Lean v. Walker, 10 John. R., 472.

obligation, for which they are respectively given as a collateral security.[1] The assignment of the principal debt draws after it the incident; as, if a note secured by a mortgage be assigned, it carries with it the mortgage of its own force and without any words to that effect;[2] for it could not continue to exist as an independent security in the hands of one person, while the note belonged to another.[3] Even where it does not in fact accompany the assignment, the assignee, it seems, is entitled to the aid of the mortgage; so long as that is not extinguished, it may be appealed to in aid of the creditor who holds the original debt.[4] Separated from the principal debt, it has no determinate value, and is not properly assignable.[5]

The mortgagee of personal property has no occasion, in order to perfect his legal title, to foreclose the equity of redemption; his title matures and becomes absolute on the failure of the mortgagor to discharge the conditions of the mortgage.[6] But there is a right of redemption in equity left, which it is necessary to foreclose; for this right of redemption is one that cannot be waived beforehand by any agreement between the parties.[7] It may, however, be foreclosed, without judicial proceedings, by a sale of the property, as in the case of a pledge, upon reasonable notice to the mortgagor.[8]

As to what shall be considered a reasonable notice of the sale of goods mortgaged or pledged as a collateral security, there does not seem to be any settled rule. The cases agree that there may be had a sale of the goods on a reasonable previous notice of the time and place of sale; and that the object of this notice is to give the pawnor an opportunity to

[1] Jackson v. Blodget, 5 Cowen R., 202.
[2] Green v. Hart, 1 John. R., 580.
[3] Martin v. Mowlin, 2 Burr., 978.
[4] Jackson v. Willard, 4 John. R., 43.
[5] Jackson v. Blodget, 5 Cowen R., 202; Powell on Mortg., 1115.
[6] Ackley v. Finch, 7 Cowen R., 290; 9 Wend. R., 80.
[7] 2 Kent's Comm., 583, 3d ed.
[8] Patchin v. Pierce, 12 Wend. R., 61; 2 John. Ch. R., 100; 1 Ves., Sen., 278; Powell on Mortg., 1041.

redeem, or to attend the sale for the purpose of seeing that the property is not sacrificed. Judging from the object, it is evident that what would be a reasonable notice in one case, would be entirely inadequate in another. Stocks might be sold at the board of brokers with entire safety on a short notice; and a sale of that kind has been held good, when made without objection, on a notice of only two days.[1] When the pledge consists of goods and chattels personal, perhaps the safest rule would be to give the same notice which is required to be given of a sale of personal property, seized on execution.[2] The presumption is, that what the law holds a reasonable notice in respect to similar goods, would be held sufficient for the protection of the mortgagee or pawnee of goods. As courts of equity watch such proceedings with vigilance, it is necessary that the manner of sale should be perfectly open and public, and free from all unfairness.[3] There must be six days' notice given of the sale of goods and chattels seized on execution, describing briefly the property, and specifying the time and place of sale. At the time and place specified, the goods to be sold must be present, subject to the inspection and examination of the bidders.[4] Unless the property is so present, the sale will be void.[5] The officer must also point out the property specifically, and sell it in parcels.[6] His proper course is to sell only so much of the property, which can be conveniently and reasonably sold separately, as will satisfy the execution.[7]

A party who sells under a power, is not bound to sell, at once, all the property bound by the power, and in many cases it would be an act of great oppression to do so. This is clearly the rule where the power is to sell real estate;[8]

[1] Willoughby v. Comstock, 3 Hill R., 389.
[2] 2 R. S., 464, 3d ed.
[3] 2 Kent's Comm., 583, 3d ed.
[4] 2 R. S., 465.
[5] 1 John. Cas., 284; 17 John. R., 116; 14 id., 222.
[6] Sheldon v. Soper, 14 John. R., 353.
[7] Hewson v. Deygert, 8 John. R., 333.
[8] 1 Caines' Cases in Error, 18; Co. Litt., 113, a; Houtailing v. Marvin, 7 Barb. R., 412.

and there does not seem to be any reason why it should not apply where the power is to sell personal property. The mortgagee or pawnee of goods exercises a trust in the act of selling them, and is responsible as a trustee for the way in which he conducts the proceedings. If there be an established custom in regard to the mode of making such sales, it should be followed; in the absence of any stipulations in the contract of pledge, it seems, the pawnor may give directions on the subject; but if he give none and there be no agreement in reference to it, the mode of sale will be left to the sound discretion of the pawnee.[1]

[1] 3 Hill R., 389. If the pledgor's right of property in the thing pledged has been sold on execution, it is evident that the notice to redeem and of sale by the pledgee should be given to the purchaser at the sheriff's sale; since by such sale he becomes the owner of the title to the property. (1 Comst. R., 20.) In Saul v. Kruger, the superior court of New-York decide that the interest of the pledgee, that is to say, his right of possession in the things pledged, may in like manner be sold on execution. In fact nothing but the possession of the pledgee can be sold, if, indeed, that can be reached in this manner. The title is not sold, for that is still in the pledgor; and the right to use the thing pledged is not sold, because that has not been conveyed to the pledgee, under the contract of pledge; neither has the right of the pledgee to sell and appropriate the pledge to the payment of the debt for which it has been given as a security been transferred, for that is merely a lien which can be enforced only by the party who holds the original debt; and the debt is a chose in action which cannot be sold on execution. Doubtless any legal interest accompanied by the right of possession for a definite period may be levied on and sold on execution; but the pledgee has no legal interest, separable from his debt and the rights which he acquires under his contract with the pledgor, and neither of these specifically can be sold on execution.

Assuming that his entire interest and right of possession can be levied upon and sold on execution, and it follows that after the sale neither the pledgee nor the purchaser at the sheriff's sale can enforce the lien. The pledgee cannot because his interest has been sold; and the purchaser cannot because he was not a party to the contract of pledge, does not hold the original debt, and neither the contract nor the lien has been transferred to him. (9 How. Pr. R., 569.)

A sale on execution of the pledgor's interest in chattels pledged, transfers the title to the property, subject only to the pledgee's lien; but it is plain that the sheriff who levies upon the pledgee's interest in the things pledged, cannot sell his lien, because the lien cannot exist separated from the debt for the payment of which it is a security. His lien is analogous to that of a mortgage lien, which cannot be separated from the bond or debt, to secure the payment of which it is given. (Jackson v. Blodget, 5 Cowen R., 202.) An assignment of a debt secured by a mortgage on either real or personal property, draws after it the mortgage as an incident, as a collateral security inseparable from the debt secured by it.

If the pledge be created for the benefit of the pawnee and another person, he is not at liberty to postpone the sale at his pleasure. Thus, where a carriage was put into the hands of the defendant as payment, or security for the payment of debts due to him and the plaintiff, and the defendant kept possession of the carriage for more than a year, had it repaired, and used it as his own, and never sold it, it was held that the defendant, having had a reasonable time to sell it, which he ought to have done at auction, if it could not be sold at private sale, might be considered as himself the purchaser, and that he was chargeable with the amount of the plaintiff's debt, the carriage being of sufficient value to pay both debts.[1] The question here did not arise between the general owner and the pawnee; and hence, it is not to be inferred from this decision that the pawnee may sell property committed to him in this manner at private sale. His duty is to sell so as to protect the rights of all the parties in interest, and he is not allowed to make an unreasonable delay in the execution of his trust, which implies that the security shall be made effectual for the purpose for which it is given.[2]

One having a mortgage made to secure a debt due to himself, and another debt due to a third person, engaged that when he could by any sale or appraisement of the

(Langdon v. Buel 9 Wend. R. 80.) The mortgagor's right to redeem goods in the hands of the mortgagee, cannot be seized and sold under process, for the reason that it is a mere equity, not capable of seizure. (1 Pick., 399.) For the same reason the pledgee's lien cannot be sold on execution, even if his possessory interest may be levied upon and sold. Hence a sale on an execution against a pledgee cannot be said to transfer any valuable interest in the subject of the pledge, at least no interest valuable to the purchaser. The mortgagee's interest in the mortgaged goods in his possession after forfeiture, may be seized and sold, because he has the title. (8 Wend. R., 258.) But what interest has the pledgee which is capable of being seized, and what in reality is sold on an execution against him? The court in Saul v. Kruger say, that "the purchaser, under a judgment against the pledgee, obtains the possession, and the right and interest of the pledgee." But it is evident that the purchaser, in such a case, does not acquire the pledgee's entire interest, that he does not reach so as to appropriate his lien.

[1] Norton v. Squire, 16 John R., 225.

[2] Pothonier v. Dawson; 1 Holt's N. P. R., 386.

mortgaged premises, realize a sum equal to both the debts, he would dispose of the same and apply the proceeds to the payment of the debt due to said third person. Having advertised and sold the premises at public auction for the most they would fetch, but not for enough to pay both debts, it was adjudged that he might first lawfully satisfy his own claim and pay the residue only to the other creditor. There being no stipulated appropriation, in case the proceeds fell short of paying both debts, it was considered that the party holding the pledge was entitled to satisfy his own demand first; and that he was answerable to the third person for only the surplus.[1]

Under the Code of Louisiana, there are two kinds of pledges specified; the pawn, and the antichresis; a thing is said to be pawned when a movable thing is given as security; and the antichresis is when the security given consists of immovables or slaves.[2] This last species of the contract must always be in writing;[3] probably for a reason similar to that which under our law renders a written transfer of choses in action necessary as a means of delivering possession, or the control of the property into the hands of the pledgee.[4]

Under our statute, assignments, as well as sales of goods and chattels by way of mortgage or security, or upon any condition whatever, unless the same be accompanied by an immediate delivery and followed by a continual change of the possession of the things transferred, are presumed fraudulent and void as against creditors of the assignor and subsequent purchasers in good faith.[5] And all mortgages, or conveyances intended to operate as such, are in like manner and to the like extent void unless duly filed.

Where one agreed to become the surety of another, in the purchase of a sloop, to be the property of the surety, and

[1] Marshall v. Bryant, 12 Mass. R., 321.
[2] Code, art. 3101, 3102.
[3] Art. 3143.
[4] 2 Comst. R., 443.
[5] 2 R. S. 195, 196, 3d ed.

under his control until the purchaser should pay the purchase money, when, and not before, it should become the property of the purchaser; and the purchaser took a bill of sale of the vessel in his own name and took possession thereof, and assigned the bill of sale to his surety, retaining the possession of the vessel, the money for which the surety had become bound, remaining unpaid, and the original agreement as to the eventual ownership continuing; it was held that the continuance of the possession of the vessel by the original purchaser, after the assignment, was, under the circumstances, sufficiently explained, and that the case was taken out of the rule of law, that possession by the vendor is prima facie evidence of fraud.[1] The possession in such a case may be explained, and shown to be without any fraudulent intent.[2] Unless explained, the presumption is that it is fraudulent;[3] the explanation must show some good and valid reason, such as the law will approve, for leaving the possession with the person selling or assigning the property.[4] Mere favor to a debtor is not such a reason.[5] The rule is the same where a bill of sale is given, retaining a right of redemption; the court decides on what may be received in evidence by way of explanation, and the jury pass upon the explanation proved.[6] One who purchases, with notice of an existing mortgage, is not a bona fide purchaser.[7] A mortgage of goods, which are at the time in the actual possession of a third person, is valid, though there be not an immediate delivery of the things assigned.[8] The want of a change of the possession, under a chattel mortgage, affords the highest presumption of fraudulent intent; but it may be rebutted, and the question of intent is one for the jury.[9] A circumstance that

[1] Hall v. Tuttle, 8 Wend. R., 375.
[2] Gardner v. Adams, 12 Wend. R., 297.
[3] Murray v. Burtis, 15 Wend. R., 212; Fonda v. Gross, id., 628.
[4] Randall v. Cook, 17 Wend. R., 53.
[5] Wood v. Lowry, 17 Wend. R., 492.
[6] Stevens v. Fisher, 19 Wend. R., 181.
[7] Sanger v. Eastwood, id., 514.
[8] Nash v. Ely, id., 523.
[9] Smith v. Acker, 23 Wend. R., 653.

prevents a delivery is an excuse only so long as it continues; the mortgage is not a pledge within the meaning of our statute authorizing a sale of the pledgor's interest.[1]

If the mortgage of chattels be given for a true debt, the question of fraud as to creditors, arising from the continued possession in the mortgagor, must be submitted to the jury, to say whether such possession is satisfactorily explained or not.[2] And the rule is the same in respect to a sale, there being a delivery, or evidence of the delivery of part of the articles sold.[3] The bona fides of the transaction is the true question to be determined by the jury; they are in such cases to find whether the sale or mortgage was made in good faith, and without any intent to defraud creditors or subsequent purchasers.[4] The case of Hanford v. Artcher was ably and elaborately argued before the late court for the correction of errors, and the principles involved, concerning which there had been an animated conflict of opinion, were considered with great deliberation; and the result arrived at has been since regarded as a settlement of the law on this delicate and important subject.[5]

Before a sale can be had under a mortgage or pledge of chattels, a notice must be served upon the person whose rights are to be foreclosed; and it is no excuse for not giving him notice, to say that he has absconded, or cannot be found. If the notice of sale cannot be given to him personally, the sale of the property should be authorized by judicial proceedings.[6] If he be dead, his rights descend to his personal representatives, who must be called upon to redeem, and are entitled to the same notice of sale as is required to be given to the pawnor.[7] If the pledgor's interest has been sold on execution, the purchaser must be notified of the sale. A sale of

[1] 1 White v. Cole, 24 Wend. R., 117 26 Wend. R., 511.
[2] Butler v. Van Wyck, 1 Hill R., 438.
[3] Prentiss v. Slack, id., 467.
[4] Hanford v. Artcher, 4 Hill R., 271.
[5] Vance v. Phillips, 6 Hill R., 433, 438.
[6] 12 Wend. R., 63.
[7] Cortelyou v. Lansing, 2 Caines' Cas. in Er., 200; 1 Comst. R., 20; 9 How. Pr. R., 569.

the pledge without such notice is a conversion of the property, which will render the pawnee answerable for its true value, without any reference to the price at which it was sold.[1] And in some cases, as where the pledge consists of stock, the pawnor will be entitled to recover its increased value after the time of the actual conversion, and sometimes even down to the day of the trial.[2] But the reasonable rule of damages would seem to be, to give the owner of the property its market value at the time he selects to call for it. The pledgee who has wrongfully appropriated the pledge, certainly cannot complain of such a measure of damages.[3]

Though a conversion of the pledge, by the pawnee, renders him liable for its value, it does not discharge the original debt. In an action for the pawn, brought against him by his debtor, he may, it seems, recoupe the amount of his debt;[4] or if the pawn have for any reason been recovered from him, his right of action for his debt will remain to him unimpaired.[5]

If there has been an agreement between the parties to the contract, regulating the mode of sale, it must be complied with;[6] but it is doubtful whether a stipulation, waiving the notice to redeem, would be regarded as valid in law.[7] An agreement to make the pledge irredeemable, would probably be condemned on grounds of public policy, as contrary to equity and good conscience, and as opening the door to oppression and fraud.

On a sale of the pledge, the pawnee, who stands in a fiduciary relation to the pawnor, cannot become a purchaser so as to acquire any personal advantage from his conduct in that relation, to the prejudice of the interests of his princi-

[1] 4 Denio R., 227.

[2] Fisher v. Prince, 3 Burr., 1363; Shepard v. Johnson, 2 East, 211; Hunt v. Fuller, 2 Black. R., 902.

[3] 2 Caines' Cases in Error, 217.

[4] 4 Denio R., 227; Jarvis v. Rogers, 15 Mass. R., 389.

[5] Ratcliffe v. Davis, Yelv., 179; Bacon's Abr. Bailment, B.

[6] Stevens v. Ball, 6 Mass., R., 339.

[7] 2 Kent's Comm., 583; Story on Bailm., § 318, 345.

pal. But the sale to him is not void, but voidable at the election of the party whose title is sought to be divested.[1]

Under the Code of Louisiana, the property of the debtor is regarded as the common pledge for the payment of his creditors, ratably, unless there exists some lawful cause of preference. At common law, a creditor of the pawnor, having no interest in the pledge, cannot require it to be sold.[2] But if he have an interest in the thing pledged, he may insist upon the sale.[3] And so doubtless he may, in equity, where the property in pledge is more than sufficient to satisfy the debt for which it is deposited, and the pawnor has no other estate from which a collection may be made. Otherwise the contract of pledge might be converted into a means of delaying and defrauding creditors.

The right of the pawnee to collect choses in action, delivered to him as collateral security, does not imply the right to compromise such demands for a sum less than that due; especially not where they are unquestionably good.[4] He is authorized to collect, but he must use diligence in doing so, and discharge his duty with fidelity and a watchful regard for the interests of the pawnor. If the contract of pledge contain a condition, that if the pawnor does not return to pay the demand for which the chattels are pledged by a given day, that then the pawnee shall dispose of them for the payment of the demand; this has been held a power to make the amount of the debt by a fair sale of the property, either publicly or privately.[5]

When the mortgagee of real or personal estate takes the thing pledged and sells it, or finally converts it to his own use, he is paid so much only towards his debt as the thing sold for, or was worth at the time of the conversion.[6] If he take the chattel covered by the mortgage, and it be of suffi-

[1] Whitlock v. Heard, 13 Ala. R., 776.
[2] Badlam v Tucker, 1 Pick R., 389.
[3] 16 John R., 225.
[4] Garlick v. James, 12 John R., 146; Bowman v. Wood, 15 Mass. R., 534.
[5] Brownell v. Hawkins, 4 Barb. R., 491.
[6] Herkimer M. & H. Co. v. Small, 21 Wend. R., 273; 5 Cowen R., 380; 9 id., 346.

cient value to satisfy the debt, the title having become vested in him, the debt is paid.[1]

Restitution.

As the contract of pledge, like that of a surety, is but accessary to the principal debt or obligation to which it is collateral; whatever discharges the original debt, discharges the accessary obligation.[2] The pledge, however, covers the interest as well as the principal of the debt for which it is given in security, and its return cannot be demanded, until payment in full has been made.[3] All contracts to pay money give a right to interest from the time when the principal ought to be paid.[4] The interest, in short, is the incident or civil fruit of the moneys due.[5] The revenue derived from labor is called wages; that derived from stock, by the person who manages or employs it, is called profit; that derived from money or debts due, is called interest.[6] These are all of essentially the same nature, being the regular harvest or return of either labor or capital, which is the produce of labor.

It is frequently asserted that under the ancient common law, the taking of interest for the use of money was deemed wholly illegal and criminal.[7] But the first statutes, on the subject, are all negative in their terms, as if designed to prohibit a practice that had been previously permitted. The first act passed provides that "none shall take for the loan of any money or commodity above the rate of ten pounds for one hundred pounds, for one whole year."[8] The subsequent statutes enacted in England, and in this state, are framed on the same principle, being prohibi-

[1] Case v. Boughton, 11 Wend. R., 106; 9 id., 83, 292; 4 id., 384.

[2] Isaack v. Clarke, 2 Bulst. R., 306; Elliot v. Armstrong, 2 Blackf., 198.

[3] 2 Kent's Comm., 583.

[4] 2 Bro. Ch. C., 3; Williams v. Sherman, 7 Wend. R., 109.

[5] Code of Louisiana, art. 537, 540; Rensa. Glass Factory v. Reid, 5 Cowen R., 587.

[6] Smith's Wealth of Nations.

[7] Hume's History, 33d chapter; 5 Cowen R., 608.

[8] 37 Henry VIII, chap. 9.

tory of interest above a certain rate, and recognizing of course the natural right to demand a compensation for the use of money, as independent of, and anterior to any law regulating the contract. Indeed, Lord Hale, who was one of the most competent and learned chief justices England can boast of, is reported to have said that only Jewish usury was prohibited at common law; which was some forty per cent and more.[1] This remark is clearly in harmony with the statutes; for it cannot be inferred from a negative law, prohibiting the taking of interest beyond a certain rate, that all interest was illegal prior to its passage. The law itself does not affirmatively give any interest whatever; it only prohibits an excessive and usurious interest.

This point is only important here, because it serves to develop the reason which underlies the decisions, allowing interest on all debts from the time they become due and payable. The law implies a contract to pay interest on money due, because the creditor has a natural and equitable right to a consideration for the use of his property, while it is withheld from him; so that the interest becomes the legal increase of the debt. In short, the interest is so much an incident of the debt that in some instances it is permitted to be recovered even beyond the penalty of the bond on which it accrues.[2] Besides, the interest, being a certain profit allowed by law, it is a part of the debt or obligation, which is covered by the pledge.[3]

The rate of interest is determined by the law of the state where the contract is made, or where it is to be executed if the execution is to take place in another state.[4] It must be a contract valid in the state where it is made; if it be void there on account of usury, it will not be enforced anywhere else.[5]

Where personal property is delivered in payment of an usurious debt, it cannot be recovered back in an action in the nature of trover; but where goods are delivered in

[1] Hard. Rep., 420.
[2] Clark v. Bush, 3 Cowen R., 151.
[3] Ord. on Usury, 29.
[4] 17 John. R., 511; 1 Paige, 220.
[5] 2 N. H. R., 42.

mortgage to secure an usurious debt, or upon an usurious consideration, the contract being void, the action lies. As the title under a chattel mortgage becomes perfect on the failure to pay according to its terms, it has been questioned whether the goods may be afterwards recovered in a suit at law.[1] The rule is that the moment the pay day passes, the legal title to the chattels under mortgage is transferred, and they become a payment on the debt to the extent of their value.[2] It is adjudged that a bona fide purchaser on a sale under a mortgage acquires title, notwithstanding the mortgage was infected with usury.[3]

If the pawnee has used due diligence in the keeping of the goods bailed, he is not responsible for the loss of them, and he may, notwithstanding, resort to the pawnor for his debt; for the law requires nothing extraordinary of the pawnee, but only that he shall use an ordinary care for restoring the goods. But indeed, if the money for which the goods were pawned be tendered to the pawnee before they are lost, then the pawnee shall be answerable for them; because by detaining them after the tender of the money, he is a wrong-doer, and it is a wrongful detainer of the goods, and the special property of the pawnee is thereby determined. A man that keeps goods by wrong, must be answerable for them at all events, for the detaining of them by him is the reason of the loss.[4] More strictly perhaps, it should be said that he is answerable for the reason that the right of action arises against him for the refusal to deliver on demand and tender of payment; that being an act of appropriation which renders him liable for their value.[5]

The property of a third person, pledged as security for another's debt, is to be treated as giving to its owner the character and rights of a surety. If the pawnee realize suf-

[1] Ackley v. Finch, 7 Cowen R., 290; but see Nellis v. Clark, 4 Hill R., 424; 1 Term R., 153; 2 Stra., 915.

[2] 5 Cowen R., 380; 9 id., 346.

[3] Jackson v. Henry, 10 John R., 185. The party to an usurious contract cannot make it the basis of either a recovery or a defence in law.

[4] Coggs v. Bernard, 2 Ld. Raym., 909.

[5] Bates v. Conkling, 10 Wend. R., 589; Mitchell v. Williams, 4 Hill R., 13.

ficient from his debtor's property to satisfy his demand, he is bound to appropriate it to the payment of his debt, and return the surety's goods.[1] A liability of the pawnee to pay another's debt, it is held, is a sufficient consideration for a pledge of property to secure his indemnity; and in this case his obligation to pay must be released or discharged before the pledge can be recovered.[2]

Nothing short of payment, or a voluntary surrender of the pledge, can deprive the pawnee of his security; thus, a chattel or chose in action, pledged for the payment of a debt, is not released from the pledge by the creditor's committing the debtor's body to prison upon an execution for the debt.[3] He may, if he so elect, exhaust his security for the payment of the debt, or he may bring his action against the debtor personally without waiving his security.[4] He may also take and hold several securities for the same debt, and he cannot be compelled to yield up either until the debt is paid. On discounting a note, there is nothing to prevent a bank from taking a chose in action from the maker and a transfer of stock from the indorser, as collateral security for its payment.[5] Cumulative security does not operate to lessen or discharge any prior security; for it is the nature of the contract of surety that it be accessary to, or in aid of the principal contract.[6] It aids in the execution of the original contract, but does not, it seems, continue its life. Where a surety received from his principal a note as indemnity, and passed over the same note to the creditor as collateral security for the principal debt, it was held that the creditor could not recover on such note after the principal debt was barred by the statute of limitations.[7] But it would be otherwise, if the note be delivered to the creditor in discharge of the liability of the surety.

[1] Strong v. Wooster, 6 Verm. R., 536.
[2] Jewett v. Warren, 12 Mass. R., 300.
[3] Morse v. Woods, 5 N. Hamp., 297; 6 Verm. R., 123, 2 Aik., 150.
[4] Elder v. Rouse, 15 Wend. R., 218.
[5] Union Bank v. Laird, 2 Wheat., 290.
[6] Story on Con., § 881, 882.
[7] Russell v. La Roque, 13 Ala. R., 149.

A contract of pledge, valid in its inception, may be discharged by the subsequent misconduct of the pawnee. Thus, Amos lent his note to Benjamin to raise money upon, taking property in pledge to secure him; Benjamin lost the note in gaming, and the winner also lost it to Charles, who took it to Amos, who had no notice of the gaming transactions, and obtained from him a new note, before payment of which Benjamin gave Amos notice not to pay the same; and it was adjudged that Amos could not hold the pledged property charged with any payment made by him on the note after such notice.[1]

The general rule is that the party selling or transferring property by way of mortgage or pledge, can convey no better title than he himself possesses.[2] *Nemo plus juris ad alium transferre potest, quam ipse haberet.* One who lends to an agent money for his private use, and takes from him, as security for its repayment, a pledge of a claim against a third person known by the lender to belong to the agent's principal, will be held bound to account to the principal for the amount he receives thereon.[3] The owner cannot be divested of his property without his consent, either expressed or implied.[4] But there is one exception to this principle; one who purchases chattels in good faith and without knowledge of the fraud, from a person who has acquired them by a fraudulent purchase, will be entitled to hold the goods even as against the true owner.[5] The ground of this exception appears to be this; that as between two innocent persons, he who has parted with the possession of his property must yield to a bona fide purchaser from the man to whom such possession is confided, with the *indicia* of title.[6] Having transferred the usual evidences of ownership, he is not permitted to

[1] Whitlock v. Stewart, 13 Ala. R., 790.

[2] Jackson v. Myers, 11 Wend. R., 533; Ash v. Putnam, 1 Hill R., 302; Mowry v. Walsh, 8 Cowen R., 238; Root v. French, 13 Wend. R., 570.

[3] Reeves v. Smith, 1 La. Ann. R., 379.

[4] 20 Wend. R., 275.

[5] 8 Cowen R., 238; Rowley v. Bigelow, 12 Pick. R., 307.

[6] 1 Hill R., 307.

assert his title against one who has purchased on the faith of these evidences.

The partly equitable ground on which this exception is based, it is evident, cannot extend to the case of a pledge received as security for an antecedent debt; though no doubt it would hold good where the pledge was deposited, at the time when the debt was contracted, as a security for its payment. But where the pawnee parts with no value on the receipt of the pledge, it can hardly be reasonable to allow him the protection which is extended to a bona fide purchaser for value.[1] Even the pawnee of a negotiable note, the title to which ordinarily passes by delivery, cannot, as we have seen, hold it against the true owner unless he has parted with value on its receipt.[2] Much less can he where he has an intimation that it is not the property of the pawnor.[3] The pawnee, who has received a pledge as security for an usurious loan, cannot be protected as a bona fide purchaser; for there cannot be, as we have said, a bona fide purchaser on usury.[4] In order to enable the purchaser from one who has acquired the goods fraudulently, to retain them, the sale or transfer must be above all suspicion, and for value. If the sale or transfer is made in direct violation of a statute, it cannot possess the good faith requisite to give validity to the transfer.[5]

Notwithstanding the exception in favor of a bona fide purchaser, which we have noticed, it is held that a fraudulent purchaser of goods acquires no title as against the vendor, and has no interest which can be seized on execution.[6] However, there is an intimation in one of the cases that a bona fide purchaser on a sheriff's sale, may acquire the

[1] Keutgen v. Parks, 2 Sand. R., 60.

[2] 2 Sand. R., 60, 68; and Ramsdell v. Morgan, 16 Wend. R., 574.

[3] Twetell v. Barenden, 8 Taunt. R., 100; 8 Barn. and Cres., 622; S. C., 5 Bing. R., 525.

[4] 16 Wend. R., 574.

[5] Clark v. Shee, Cowp., 197, 200, 201; Fitnoy v. Gwillim, 1 Term R., 153.

[6] Allison v. Mathieu, 3 John. R., 238; Van Cleef v. Fleet, 15 id., 151; 15 Mass. R., 156.

benefit of the exception.[1] But the rule does not appear to be fully established, and it is scarcely supported by principle. The purchaser in such a case has his remedy over against the sheriff; and it is admitted that he acquires nothing by the seizure.[2]

The duty of restitution requires of the pawnee that he make a full return of the income and profits realized by him from the pledge.[3] He is not allowed to derive from the contract any advantage beyond the security which it gives him for the payment of his debt. Though the fruits of the pledge are deemed to make a part of it, and are therefore required to remain with it in the hands of the pawnee, he cannot appropriate them to his own use; but must, on the contrary, give an account of them to the pawnor.[4]

The statute of limitations does not run against the pawnor's right of redemption.[5] But it appears it may be barred as a stale and deserted claim by a great lapse of time, under such circumstances as may create the inference that the property has been really transferred and accepted in payment.[6] If the debt for which it is given as a collateral security, is barred by the statute of limitations within six years, on the presumption that it has been paid, it should seem that the same presumption of sale ought to prevail in respect to the thing pledged; unless the pledge should be deemed a continual admission of the debt secured by it. Otherwise the pawnee would lose the benefit of his security, and might be compelled to restore the pledge, even where he had in factreceived no payment.[7]

It is held that a mortgage of real estate, where the possession is not delivered to the mortgagee, given as collateral security for the payment of a note, cannot be enforced after

[1] Buffington v. Gerrish, 15 Mass. R., 156.

[2] Ash v. Putnam, 1 Hill R., 308.

[3] 2 Kent's Comm., 578, 579; Story on Bailm., § 343.

[4] Code of Louisiana, art. 3135.

[5] Kemp v. Westbrook, 1 Ves. R., 278.

[6] Bay v. Bogart, 2 John. Cas., 432; 10 Wend., 365; Huntington v. Mather, 2 Barb. R., 543.

[7] Jackson v. Sackett, 7 Wend., 94.

the note is barred by the statute of limitations.[1] The presumption that it has been paid, arising from the lapse of time, is so strong that it requires some positive testimony to prevail over it. Indeed, the statute of limitations is founded principally upon the presumption of actual payment, and the difficulty of proving it from lapse of time.[2]

The redemption of the pawn is not prevented by the statute of limitations, which runs only from the conversion of the thing pawned; and consequently an action may be brought for it within six years from that time. But a simple contract debt is not any the more protected from the statute because accompanied by a pledge as collateral security;[3] nor is it on that account, the less subject to the mischief against which the staute was intended to guard. If the debt be contracted and the pledge given for its payment at the same time, and the debt be barred by the statute, it seems the pawnor may recover the pledge; unless, indeed, it should be held that the pawnee acquires with the special property transferred to him a power coupled with an interest to sell the pawn and apply the proceeds to the payment of the debt. Such an authority cannot be revoked at the pleasure of the person granting it; for it is given for a valuable consideration, and it constitutes part of a security for money; and is necessary to give effect to such security.[4] After a long lapse of time the title of the pawnee to the things pledged will be deemed perfect, in analogy to the rule of law in regard to mortgages.[5]

It is asserted that where there is an injury or conversion of the pledge by a stranger, for which an action lies both by the pawnor and pawnee, a recovery by either of them will oust the other of his right of action; for there cannot be a

[1] 7 Wend. R., 98.

[2] Beach v. Fulton Bank, 3 Wend., 585; 7 Wend. R., 99; 3 John Ch., 586; 5 id., 550; 2 Denio 577.

[3] Slaymaker v. Wilson, 1 Pennsyl. R., 216, per Chief Justice Gibson; and see also Clark v. Bull, 2 Root R., 329; Story on Bailm., § 362.

[4] Wash v. Whitcomb, 2 Esp. R., 565; Bromley v. Holland, 7 Ves., 28; Hunt v. Rousmanier, 8 Wheat. R., 174; 10 Barnw. and Cres., 731; 2 Kent. Com., 644.

[5] Lockwood v. Ewer, 2 Atk. R., 303; Story on Bailm., § 346, 347, 348, 362.

double satisfaction. But where the pledge appears to have been made by the plaintiff's vendor, before sale to him, to secure a debt or duty to a third person, the plaintiff cannot recover unless he show such debt or duty to have been discharged, or that the operation of the pledge has ceased in some other way.[1] The bailee's right of action depends upon and arises out of the fact that he possesses a legal interest in the goods bailed.[2] If he have not a qualified right to the goods, as against the bailor, his principal may bring the action for their conversion, and recover their full value. So, also, the pledgee may recover their full value against a stranger who has seized or appropriated them, and then stand as trustee for the general owner for the balance of the recovery, after satisfying his lien.[3] As against the owner, or one who represents him, the bailee having a special property recovers only to the extent of his interest, and that only where the goods are of equal or greater value than the lien.[4]

It is assumed in many cases, without remark, that the right of the pawnee over the pledge continues, notwithstanding the lapse of time exceeding the period within which an action may be brought under the statute of limitations for the original debt.[5]

In Massachusetts, it seems to be held that the pawnee cannot proceed under the process of attachment, by attaching generally the property of his debtor for the debt so secured by a pledge, without first restoring the pawn.[6] If he intends to avail himself of the security afforded by the pledge, his true course would appear to be a direct sale of the goods pawned, on reasonable notice to the pawnor.[7]

[1] Bush v. Lyon, 9 Cowen R., 52.

[2] Smith v. James, 7 Cowen R., 328; Rooth v. Wilson, 1 Barn. and Ald., 59.

[3] Lyle v. Barker, 5 Bin., 457, 460.

[4] Ingersoll v. Van Bokkelin, 7 Cowen R., 670, and the cases there cited Pomeroy v. Smith, 17 Pick. R., 85; 13 Co. Rep., 69.

[5] 2 Caines' Cas. in Error, 200; Kemp v. Westbrook, 1 Ves. R., 278; Higgins v. Scott, 2 Barn. and Adolph., 413; Yelv. R., 178, 179; Gage v. Bulkley, Ridg. Cas. Temp. Hard., 278.

[6] Cleverly v. Brackett, 8 Mass. R., 150.

[7] Whitaker v. Sumner, 2 Pick. R., 399; 14 Pick. R., 332; 5 Pick. R., 178.

It is said that the right of the pawnee to the pledge, as a security, may be extinguished by his taking a higher security for the debt, such as a bond, or by his recovery of a judgment thereon.[1] But the doctrine of merger under our law, allows the courts in many cases to look behind the judgment to see upon what it is founded, for the purpose of protecting the equitable rights connected with the original relation of the parties.[2] And it is held expressly that a collateral security of a higher nature, as a bond and warrant of attorney, on which judgment is entered, does not extinguish the original contract, as long as it ramains unsatisfied. If executed between other parties, covering also other debts, it will be deemed only a collateral security.[3] A debt is not honestly extinguished until it is paid, and our courts do not incline to multiply artificial mergers.[4] A judgment recovered on another judgment, is not a satisfaction of the latter till the money is paid.[5] Neither is a recovery, on a covenant for the payment of rent, an extinguishment of the rent, without actual satisfaction.[6]

Whether a judgment confessed for a debt, which the debtor had previously secured by notes and a chattel mortgage, operates to merge and extinguish the prior securities, will depend upon the intent of the parties to the judgment; and the declaration of the parties that the judgment was taken as collateral to the prior securities, is evidence of that fact for the consideration of the jury.[7] The doctine of merger, as laid down in Butler v. Miller, does not work the extinguishment of collateral securities until the original debt is satisfied. The rule, that a security of a higher nature extinguishes inferior securities, only applies to the state or

[1] Story on Bailm., § 360, 361.

[2] Clark v. Rowling, 3 Comst. R., 216.

[3] Day v. Leal, 14 John. R., 404; 13 id., 240; 11 id., 513; 4 Cowen R., 567; Davis v. Anable, 2 Hill R., 339; Sterling v. Rogers, 25 Wend. R. 658.

[4] Gregory v. Thomas, 20 Wend. R., 17.

[5] Preston v. Preston, Cro. Eliz., 817; Mumford v. Stocker, 1 Cowen R., 1; Andrews v. Smith, 9 Wend., 53.

[6] Chipman v. Martin, 13 John. R., 241.

[7] Butler v. Miller, 1 Demo R., 407, and 5 id., 159.

condition of the debt itself, and means no more than this; that when an account is settled by a note, a note changed to a bond, or a judgment taken upon either, the debt as to its original or inferior condition, is extinguished or swallowed up in the higher security; and that all the memorandums or securities by which such inferior condition was evidenced lose their validity. It has never been applied to the extinguishment of distinct collateral securities, whether superior or inferior in degree. These are to be cancelled by satisfaction of the debt, or voluntary surrender alone.[1] A pledge being a security of this nature, is not affected by the recovery of a judgment, or the taking of a bond, or other security for the original debt; it is given to secure the payment of the demand, and the law will hold it to the accomplishment of that purpose.

A sale of the goods pledged, on reasonable notice, transfers the title to the purchaser; and a recovery against the pawnee for a conversion or appropriation of the property to his own use, as by a sale without a previous notice to redeem, works a legal transfer of the goods to the bailee, on payment of the amount recovered.[2] A recovery does not change the title until an actual satisfaction is made. The pawnor is not driven to an action for every misconduct of the pawnee, amounting to a conversion of the things pledged; for in an action against him to recover the original debt, he may recoupe the value of the goods bailed.[3]

Sir William Jones concludes the consideration of the subject of pledges by a statement of this singular case, from a curious manuscript preserved at Cambridge, containing a collection of queries in Turkish, with the decisions or concise answers of the Mufti at Constantinople: "Zaid had left with Amru divers goods in pledge for a certain sum of money, and some ruffians having entered the house of Amru took away his own goods together with those pawned by Zaid." The question propounded was, "whether since the debt

[1] Butler v. Miller, 1 Comst. R., 500.

[2] Osterhout v. Roberts, 8 Cowen R., 43; 7 id., 348; 1 John. R., 290.

[3] Stearns v. Marsh, 4 Denio R., 227.

became extinct by the loss of the pledge, and since the goods pledged exceeded in value the amount of the debt, Zaid could legally demand the balance of Amru;" to which it was answered by the law officer of the Ottoman court, with the brevity usual on such occasions, *it cannot be.* From this the learned jurist infers that either the Turks must have been wholly unacquainted with the imperial laws of the Roman Empire in the East, or that the loss in this case must be understood to have occurred though Amru's fault. From the knowledge we have of the habits and customs of the race of Amru, it would be no more than reasonable to infer that he must have connived at the robbery, and that he ought to have been held answerable for the loss. It is certain, however, that the Turks did not, to any very great extent, adopt either the arts, the learning, or the laws of the Eastern Empire.[1]

[1] Jones on Bailm., 84, 85. Pledges for debt are of the highest antiquity; they were used in very early times by the roving Arabs, one of whom finely remarks, "that the life of man is no more than a *pledge* in the hands of destiny;" and the salutary laws of Moses, which forbade certain implements of husbandry and a widow's raiment to be given in pawn, bear a close resemblance to the Roman law, which prohibited wearing apparel, utensils for tillage, and things esteemed sacred in the Roman law, from ever being put in pawn. The common law is not so humane; or perhaps the necessity of such enactments, is not now so great as it must have been in the earlier ages. Story on Bailm., § 293; Jones on Bailm., 84.

CHAPTER VI.

CONTRACTS FOR HIRE.

BAILMENTS for hire embrace a great variety of contracts connected with and growing out of the delivery of personal property, on an agreement mutually beneficial to the parties contracting. Letting for hire, or as the phrase is commonly used, letting to hire, is a bailment, where compensation is given for the use of a thing, or for labor and services about it.[1] The contract embraces the hire of deposit,[2] the hire of things,[3] the hire of labor and services,[4] and the hire of carriage or transportation.[5] Warehouse-men receive goods on deposit for a compensation paid for the custody or storage of the goods.[6] One who hires a thing for use, acquires a right to the possession and use of the thing hired for the term agreed upon; while the letter to hire, gains an absolute property in the price of the hire. Where cloth is delivered to a tailor to be made up into a suit of clothes, or a gem to a jeweler to be set or engraved, or timber to a carpenter to be framed into a house; the tailor, jeweler and carpenter are bailees for labor and services, to be bestowed on the things intrusted to them, for a compensation. The hire of carriage is the contract under which the common carrier, by land or water, engages for the carriage and safe delivery of goods and merchandise This is a species of bailment of great importance and daily use in the commercial world.

[1] 2 Kent's Comm., 586; Jones on Bailm., 85, 86.
[2] Jones on Bailm., 97.
[3] 2 Kent's Comm., 586.
[4] 1 Cowen's Trea., 66, 3d ed.
[5] Jones on Bailm., 90.
[6] Story on Bailm., § 457.

Our law of bailment has, to a considerable degree, grown out of the civil code; and many of the principles now established in the common law have their root and foundation in the laws of imperial Rome; but with us, as with them, the vital element of every law is that natural equity which inspires and gives to it an authority over the human mind. We do not accept it as a compliment to an early age or to the masterly genius of a great people; it is its own authority, witnessed by the harmonious consent of people, widely separated from each other in lineage and language, but loyal to the same eternal law of justice.[1]

It may not be of any practical importance, but it is gratifying to be able to trace a principle of law to its source; to find, for example, that the rule which requires of one who hires a chattel for use, the same degree of diligence that all prudent men, that is the generality of mankind, use in keeping their own goods, is older than any existing legislative power.[2] We feel entire confidence in a law that has the sanction of the concurrent wisdom of nations in all ages; and which, like a proverb freighted with a rich and just thought, passes from mind to mind with an inherent vitality that makes it a part of the currency of the world, and stamps it with the image and superscription of a universal law.[3] It is this kind of universality which is implied in the pregnant maxim, that the voice of the people is the voice of God.

Sir William Jones considers bailments for hire under three classes: 1. *Locatio* or *locatio-conductio rei*, is a contract by which the hirer gains a transient qualified property in the

[1] The contract of letting and hiring is usually divided into two kinds; 1. *Locatio* or *locatio-conductio rei*, the bailment or letting of a thing to be used by the bailee for a compensation, to be paid by him. 2. *Locatio operis*, or the hire of the labor and services of the bailee for a compensation to be paid by the bailor. And this last kind is again subdivided into two classes: 1. *Locatio operis faciendi*, or the hire of labor and work to be done, or care and attention to be bestowed on the goods bailed by the bailee for a compensation; or 2 *Locatio operis mercium vehendarum*, or the hire of the carriage of goods from one place to another for a compensation. Story on Bailm., § 370.

[2] Jones on Bailm., 87, 88.

[3] Id., 89.

thing hired, and the owner acquires an absolute property in the stipend or price of the hiring; so that in truth it bears a strong resemblance to the contract of sale; in effect it is a sale of the use for a given time. 2. *Locatio operis faciendi*, or letting out of work and labor to be done, or care and attention to be bestowed by the bailee on goods bailed for a recompense. 3. *Locatio operis mercium vehendarum*, is a contract for the carriage of goods for a reward, which admits of many varieties of form, but of none in the substantial obligations of the bailee.[1] This classification is convenient enough where the intention is to develope the principles of the common law by a constant reference of them to the forms of contract used under the civil code, with a view of demonstrating the constant harmony which is found or supposed to exist between the two systems. But it is not so appropriate in a work designed for practical utility, and whose main object is to ascertain and state in plain terms the established principles of the common law. For us, we apprehend, it will be found a more convenient order of arrangement, to consider the subjects embraced in this general class of bailments for hire, under English terms, which express in clear as well as popular language, the nature of each contract. Hire of deposit, hire of things, hire of labor and services, and hire of carriage, are probably as brief and definite and expressive, as any equal number of Latin words; and they certainly have this advantage, of being universally understood.

HIRE OF DEPOSIT.

Where one person deposits his goods with another, and pays a consideration for the custody of them, the contract being mutually beneficial to the parties, the bailee must answer for ordinary neglect.[2] He is required to exercise a degree of diligence greater than that which is demanded of the depositary without reward; and he is excused for a de-

[1] Jones on Bailm., 86, 90, 103; 2 Kent's Comm., 586.

[2] Jones on Bailm., 119.

gree less than that which is exacted of the borrower.[1] The fact that he receives a reward binds him to a diligence, increased beyond that of the mere depositary; while the service he renders to the owner of the goods, in keeping and guarding them, brings him under a less stringent obligation than that which rests upon one who borrows the use of a chattel, without rendering any sort of recompense for it. When it is said that the depositary for hire is responsible for the exercise of ordinary diligence, the meaning is, that he is bound to take that care of the goods intrusted to him, which every person of common prudence, and capable of governing a family takes of his own concerns.[2] Ordinary care is the settled and established standard of diligence. Though the word *ordinary* is equivocal, and sometimes involves a notion of degradation, its legal import is invariably the same, denoting the measure of diligenee which prudent men of business commonly take of their own affairs. It is a positive and affirmative rule, which remains unchangeable, while it adapts itself to the nature of the business in hand, and to the fixed habits and usages of the community in which it is executed.

There are infinite shades of care, from the slightest momentary thought or transient glance of attention, to the most vigilant anxiety and solicitude; but extremes, in this case, as in most others, are inapplicable to practice; the first extreme would seldom enable the bailee to perform the condition, and the second ought not in justice to be demanded; since it would be harsh and absurd to exact the same anxious care which the greatest miser takes of his treasure, from every man who borrows a book or a seal. The degrees of care, therefore, which the law requires, lie between these extremes, and are graduated so as to meet the circumstances and the nature of each particular contract.[3]

[1] Jones on Bailm., 36, 65, 91.

[2] Doorman v. Jenkins, 2 Adolph. and Ellis, 256; Jones on Bailm., 6; Story on Bailm., § 11.

[3] Jones on Bailm., 6, 117, 118, 119.

The rule, as we have said, is an established and invariable rule; but the subject matter upon which it operates, changes continually with the circumstances attending the execution of each contract. What would be ordinary diligence in taking care of a quantity of pig-iron, would not suffice in the custody and preservation of a picture; for the plain reason that what would be ordinary diligence in one case would be much less than ordinary diligence in the other.[1] In this sense, what shall be deemed ordinary care, is a question of fact, to be resolved by an inquiry into the nature of the business, and the extent of that care which is ordinarily exercised by prudent men in the preservation of the like kind of property.[2]

Where one delivers horses or cattle to another for pasturage for a compensation to be paid, the bailee is not responsible if they be stolen from the field; but if the person to whom horses or cattle are bailed for agistment, leave open the gates of his field, in consequence of which neglect they stray and are stolen, the owner has an action against him.[3] If a man takes in a horse, or other cattle, to graze and depasture in his grounds, which the law calls agistment, he takes them upon an implied contract to return them on demand to the owner.[4] A special qualified property is transferred to the bailee, together with the possession; and he may, as well as the bailor, maintain an action against such as injure and take away these chattels. Being responsible for their redelivery on demand, he may vindicate his possessory interest against any stranger or third person.[5] The owner may also bring his action for the recovery of the property, but not both of them.[6] In order to recover, the plaintiff must show a present right of possession in the

[1] Mytton and Cock, 2 Stra., 1099; Story on Bailm., § 11.

[2] Vaughan v. Menlove, 3 Bing., New Cas., 468, 475.

[3] Mosley and Fossett, Mo., 543; 1 Ro. Abr., 4; Bac. Abr. Bailment, D.

[4] Cro. Car., 271; 2 Black. Com., 452.

[5] 2 Black. Com., 453; 13 Rep., 69; Rooth v. Wilson, 1 Barn. and Ald., 59; Rushforth v. Hadfield, 6 East R., 519; 7 East R., 224; Blake v. Nicholson, 3 M. and S., 167; 5 id., 180; Duncan v. Spear, 11 Wend. R., 54.

[6] Spencer v. Blackman, 9 Wend. R., 167

chattels. The owner cannot recover, if it appear that the bailee has an interest in them for an unexpired term, or a a present right to the possession or use of them.[1]

Under the Code of Louisiana the general rule is, that the depositary is bound to use the same diligence in preserving the deposit as he uses in preserving his own property; and this rule is more rigorously enforced where he receives a compensation for the custody.[2] The peculiarity of this law is, that it measures the care demanded of the bailee by the habits of each individual who may happen to hold that relation. It has not the severe quality of an abstract principle, that prescribes the same unalterable rule of action for every man; and hence for purposes of equity, in all exceptional cases, it has a more ready adaptation to circumstances, which renders it in some sense superior to the common law. Indeed, the object of the equity branch of English and American jurisprudence is to allay, modify, qualify and soften the rigor of the common law.[3] To detect latent frauds and concealments, which the process of the courts of law is not adapted to reach: to enforce the execution of such matters of trust and confidence as are binding in conscience, though not cognizable in a court of law: to deliver from such dangers as are owing to misfortune or oversight, and to give a more specific relief, and more adapted to the circumstances of the case, than can always be attained by the rules of the positive common law, this is the province of our courts of equity; which are cognizant, moreover, in matters of property only.[4]

In general, the bailee who is intrusted with the custody of goods for hire, not being bound by law to receive them, has no lien except by a special agreement.[5] His contract for the keeping, or custody of the goods, stands on the same footing with other contracts, and may be enforced in the same manner. The bailee for hire has his lien for his rea-

[1] Bush v. Lyon, 9 Cowen R., 52; 11 John R., 285; 13 Wend. R., 63.
[2] Code, art. 2908, 2909.
[3] Warren's Law Studies, 279, 296, 2d ed., per Lord Eldon.
[4] 1 Bla. Comm., 92.
[5] Grinnell v. Cook, 3 Hill R., 486; Morgan v. Congdon, 4 Comst. R., 552.

sonable charges wherever by his labor and skill he has imparted an additional value to the goods. This rule does not extend to the farmer who receives the horses or cattle of another to pasture, unless there be an agreement to that effect.[1] The factor to whom goods are consigned for sale, has by custom a lien upon them for advances made or liabilities incurred thereon, and also for his reasonable charges or commissions.[2] His duty is to manage the affairs of his principal in the same manner, and with that care and diligence which a prudent and discreet merchant would exercise in relation to his own affairs. But he must obey his instructions; because it is the principal who bears the loss. The factor must, for that reason, be liable for negligence or for departure from instructions in the same manner as in ordinary consignments.[3]

After the sale of the goods by the factor, his lien remains on the proceeds; but it attaches only on goods which have come regularly into his possession. He has no lien on goods of which he acquires possession by an illegal act, or in bad faith.[4] A factor who receives goods without instructions, must act on his best judgment and sell to the best advantage. A simple consignment of goods unexplained, by the well settled rule of commercial law, only shows that the consignee is thereby constituted the authorized agent of the owner, whoever he may be, to receive and sell the goods and account for the proceeds.[5]

The effect of a commission *del credere* is, in several particulars, to place the factor in a new relation as to his principal. It is true, he is the debtor, but the principal still retains the

[1] Chapman v. Allen, Cro. Car., 271; Yorke v. Grenaugh, 2 Ld. Raym., 868; Judson v. Etheridge, 1 Cromp. and Mees., 743.

[2] Bell v. Palmer, 6 Cowen R., 128; Bryce v. Brook, 26 Wend. R., 367; 21 id., 14.

[3] Rundell v. Moore, 3 John Cas., 37; Evans v. Polter, 2 Gall., 13; Grey v. Oakly, 13 John R., 333; 3 Selden R., 186.

[4] The Bank of Rochester v. Jones, 4 Com. R., 497; Mitchell v. Ede, 11 Adol. and Ellis, 888.

[5] Conard v. The Atlantic Ins. Co., 1 Peter's R., 444; 7 Cowen R., 328; 2 Hill, 151; 3 Selden R., 288; his lien does not commence until he accepts the goods on the terms of the consignment.

right, at any time before payment, to resort to the purchaser as collateral security. It is a rule for the protection of the principal. A general factor may wait to receive instructions as to the mode of remitting the net proceeds, and is not liable to an action until a default, on his part, in remitting or paying the proceeds according to the orders of his principal.[1] The only difference beteen a factor, acting under a *del credere* commission, or without one, is as to the sales made. In the former case he is absolutely liable, and may correctly be said to become the debtor of his principal; but it is not strictly correct to say that he is placed in the same situation, as if he had become the purchaser himself; for, as we have seen, the principal, notwithstanding this liability, may exercise a control not allowable between creditor and debtor. When the principal appears, the right of the factor to receive payment ceases. The effect of the commission is not to extinguish the relation between principal and factor, but applies solely to a guaranty that the purchaser shall pay. The liability is not contingent, so as to require legal measures to be exhausted against the purchaser, before the factor is bound, but an engagement to pay on the day the purchase money becomes due. Although the factor is absolutely liable, he is not bound to pay until the money becomes due from the purchaser. Subject to the limitations above mentioned, the factor, under a commission, becomes a debtor to his principal.[2]

The doctrine of general lien in favor of a factor, it seems, is not confined to a general agency, but applies as well to a limited number of distinct transactions as to a continuous dealing.[3] Whenever the relation of principal and factor exists, the right of lien attaches to secure all advances made or liabilities incurred in the the course of his business by the factor. So also it seems that the doctrine of lien may be enforced by a purchasing, as well as by a selling factor.[4]

[1] Ferris v. Parris, 10 John R., 285.

[2] Baker v. Langhorne, 6 Taunt., 519; Leverich v. Meigs, 1 Cowen R., 645; M'Kenzie v. Scott, 6 Brown Par. Cas., 280; 7 Taunt., 164.

[3] Bryce v. Brooks, 26 Wend R., 367; 21 id., 14.

[4] 26 Wend. R., 372; 12 Wend. R., 362; Stevens v. Robbins, 12 Mass. R., 182.

A factor may deliver the goods of his principal to a third person as security, with notice of his lien, and as his agent, to keep possession for him in order to preserve the lien.[1] But he cannot pledge the goods of his principal for advances thereon.[2] If he do so, it is a conversion, and he becomes liable for their value.[3]

A factor, advancing money on goods in his hands, is not confined in his remedy for the advances to the goods or fund deposited; he gives a joint credit to the fund and to the person of his principal. But the nature of the contract requires that resort must first be had to the fund, if it can be made available.[4] He is entitled to charge interest on his account, where his customer knows that that is his ordinary usage.[5] The payment of a balance of account by a factor or commission merchant to his principal, after the sales are made, and for the purpose of closing the accounts between the parties, is an assumption by the factor of the outstanding debts; and consequently the principal is no longer accountable or bound to refund, though the factor finally fail to recover the price of the goods so sold on commission, to the proceeds of which he looked for reimbursement.[6] Taking a security, such as a bond or note, payable to himself on a sale of his principal's goods, does not in this state *per se* render the factor responsible to his principal for the value of the goods sold; the note does not extinguish the demand, but leaves the principal to his usual remedy.[7] It seems to have been held otherwise in the circuit court of the United States in the Pennsylvania district, where a bond was taken for the amount payable to the factor.[8] As he may sell on credit, unless prohibited by his instructions, he is not respon-

[1] Urquhart v. M'Iver, 4 John. R., 103.
[2] Buckley v. Packard, 20 John. R., 421.
[3] Kennedy v. Strong, 14 John. R., 128.
[4] Corlies v. Widdifield, 6 Cowen R., 181.
[5] Meech v. Smith, 7 Wend. R., 315.
[6] Oakley v. Greenshaw, 4 Cowen R., 250.
[7] Corlies v. Cumming, 6 Cowen R., 181.
[8] Jackson v. Baker, 6 Cowen R., 183, note a; Price v. Ralston, 2 Dall., 60; but see Goodenow v. Tyler, 7 Mass. R., 36.

sible if he appear to have acted with reasonable care and prudence, and has not been guilty of either a breach of orders, negligence or fraud.[1] And where he sells on credit, he is not liable to pay until the purchase money becomes due. But if, at the expiration of the credit given, he take a note or other security payable to himself, he makes the debt his own.[2] But the principal is not compelled to accept the factor as his debtor for the amount, nor to relinquish any part of his security for the debt; he may follow either the identical artitle, or its proceeds in the possession of the factor, his legal representatives or assigns, so long as he can trace his property or the proceeds, and the same has not been paid away without notice of the principal's claim.[3] A payment to the factor is good, but the principal has a right to control the collection, and may sue for the price of the goods sold in his own name, whether the sale was made by a factor or by an auctioneer.[4]

The factor, being a commercial agent whose rights and resposibilities are regulated with a view to public policy, does not stand in the same relation to his principal as the ordinary depositary for hire. It is true, he receives a compensation for the custody of his principal's goods; but that is not the chief nor even an important part of his duties; he acts as an agent to purchase and sell goods, and is responsible not only as a bailee for their safe keeping, but as an active agent for the fidelity with which he discharges his active trust.[5] Where his instructions are clear, he must observe them;[6] where these fail, he is at liberty to exercise his discretion according to the general usages of trade. If he acts with diligence and good faith, he will be protected; but his diligence must be skillful, and his good faith must

[1] 6 John. R, 69; and 5 John. R., 68.

[2] Hosmer v. Beebe, 14 Martin's Louis R., 368; 2 Kent's Comm., 623.

[3] Veil v. Mitchell, 4 Wash. Cir. R., 105; Taylor v. Plumber, 3 Maule. and Scho., 562.

[4] Girard v. Taggart, 5 Serg. and Rawle., 19.

[5] Story on Bailm., § 455, 456.

[6] Sheeter v. Hurlock, 1 Bing. R., 34.

be as affirmative and active as the nature of his contract demands.[1]

Warehouse-men.

A warehouse-man, or depositary of goods for hire, is bound only for ordinary care, and is not liable for a loss arising from accident where he is not in default; and he is not in default when he exercises such due and common diligence in the care of goods intrusted to him as he would bestow in the care of his own.[2] If the compensation he receives be for house-room, and not a reward for care and diligence, the bailee is only bound to take the same care of the goods as of his own; and if they be stolen or embezzled by his servant, without gross negligence on his part, he is not liable;[3] and the *onus* of showing negligence seems to be upon the plaintiff, unless there is a total default in delivering or accounting for the goods.[4]

The warehouse-man, who is also a wharfinger or forwarding merchant, assumes the double responsibility of storing and forwarding the goods intrusted to him; and is responsible for ordinary care, skill and diligence in the discharge of the duties incident to the business. A roll of carpeting was delivered by the plaintiff's agent to the clerk of the defendant, the latter being a storage and forwarding merchant, having his place of business on the line of the Erie canal, to be forwarded as directed, in the usual course of business; the carpeting being deposited, as other goods were, in the defendant's store, as he was in the habit of receiving them; the charges to follow the carpeting, and to be paid at the end of the route, in the customary manner: the defendant took no receipt and kept no memorandum of the transaction, and having totally failed to account for the property from the time it was received by him, it was held that he

[1] Ulmer v. Ulmer, 2 Nott and McCord, 489; 2 Kent's Comm., 623, 624, 625; Micklethwaite v. Thebaud, 4 Sand. R., 97.

[2] 4 Term R., 581; Peake's N. P., 114; 4 Esp. N. P. R., 262.

[3] Finacue v. Small, 1 Esp. N. P. R., 315; Schmidt v. Blood, 9 Wend. R., 268.

[4] 7 Cowen R., 500, and note a.

was liable in his character of warehouse-man and forwarder for the value of the property, without further proof of negligence in the first instance; and that the defendant was bound to give some account of the property in order to cast upon the plaintiff the *onus* of proving negligence.[1]

Where the defendant shows the goods to have been lost, it is held the law will not intend negligence, and that then the onus of proof is shifted upon the plaintiff.[2] The refusal to deliver the goods on demand is prima facie evidence of a conversion.[3] The bailee is not at liberty to be silent when a reasonable demand is made, though not at the place stipulated for delivery.[4] Such silence is a refusal, or a total failure to account for the property delivered, which renders him liable.[5]

It appears that by the custom of warehouse-men, known and established, they have a right to receive goods from the carrier, if in apparent good order, and advance to the latter his reasonable charges for the carriage of them, and to hold them subject to the lien of the carrier for the amount thus advanced; and if delivered to the owner without immediate payment, at the owner's request, a suit may be maintained to recover the amount advanced to the carrier in pursuance of such custom; if the goods have been injured by the carrier, which injury is not apparent or known to the warehouse-man at the time of his receiving the goods, the owner must look to the carrier for his damage, and cannot recoupe such damage in an action by the warehouse-man.[6] The parties are supposed to contract with a reference to the uniform custom, so that the established custom enters into and makes a part of the contract. Where goods are delivered to a carrier, marked for a particular destination, without any

[1] Bush v. Miller, 13 Barb. R., 482.

[2] 9 Wend. R., 268; 2 Salk., 655.

[3] Dunlap v. Hunting, 2 Denio R., 643. Being bound to deliver on demand, an unqualified refusal to deliver, is sufficient evidence to justify the jury in finding a conversion.

[4] Higgins v. Emmons, 5 Conn. R., 76; Singerland v. Morse, 8 John. R., 474.

[5] 13 Barb. R., 491.

[6] Sage v. Gittner, 11 Barb. R., 120.

directions as to their transportation and delivery, save such as may be inferred from the marks themselves, the carrier is only bound to transport and deliver them according to the usage of the business in which he is engaged, whether the consignor knows of the usage or not.[1] If, for example, goods are marked for Buffalo, and delivered to a transportation company in New-York, whose line ceases at Albany, they must be forwarded by the canal or railroad, according to the uniform custom; the carrier has a right to presume that the consignor of the goods intends the carrier shall transport and dispose of them in the usual and customary way. And when he does this, by passing them over to a common carrier at Albany, to be carried to, and delivered at their place of destination, his liability ceases.[2]

Where such is the general custom of business, a delivery by the common carrier to a warehouse-man at the place of destination, is a delivery to the consignee, so as to release the carrier from his liability as such.[3] If there be no custom shown, it is the carrier's duty to make a personal delivery to the consignee; but the usage and course of business may be proved, so as to regulate the mode of delivery.[4] The usage and custom, regulating the business of warehouse-men, have the same force in enlarging and limiting the obligations into which they enter. The warehouse-man, who receives goods from the carrier in apparent good order, and pays the carrier's charges thereon, does not acquire simply the interest of the carrier, subject to any claim there may be against him for damages. He does not stand in the relation of an assignee of the carrier's charges; nor does he assume the burden of showing that the goods were not injured while in the custody of the carrier.[5]

Where a warehouse-man delivers property deposited with him for storage, to some person other than the true owner,

[1] Van Santvoord v. St. John, 6 Hill R., 157.

[2] Garside v. Proprietors of Trent and Mersey Navigation, 4 Term R., 581.

[3] 4 Term R., 581; Price v. Powell, 3 Comst. R., 322.

[4] Gibson v. Culver, 17 Wend. R., 305; 5 Term R., 389; Ostrander v. Brown, 15 John. R., 39; Barnes v. Foley, 5 Burr., 2711; 7 East R., 224.

[5] 11 Barb. R., 120.

through either mistake or negligence, he is answerable for a conversion of the property.[1] And the conversion will be deemed to have occurred at the time of the demand and refusal to deliver the property; and the owner may recover the value of the goods at that time with interest, or the highest price between that time and the day of the trial. The evidence of a refusal to deliver on demand, casts the *onus* upon the bailee to show that the property has been lost without fault or neglect on his part.[2]

Where goods deposited with a warehouse-man are sold, it is clear that the purchaser could not formerly recover in his own name in an action of assumpsit brought upon the contract of bailment made with the former owner; but the contract being assigned, it must be otherwise under the Code of Procedure.[3] So, also, it was held under the former practice, that where goods were lost through the mere omission of the carrier, an action of trover would not lie even after demand and refusal, but that the owner should bring either assumpsit or a special action on the case.[4] The reason governing this decision was based on the form of the action; it being necessary in the action of trover to prove a conversion; and as a mere non-feasance does not work a conversion of the property, that form of action could not be sustained.[5]

A receipt of a quantity of provisions to be paid for when sold, at a stipulated price, is evidence of a sale; and after a considerable lapse of time it will be treated as such, on the presumption that the bailee has disposed of the property in the meantime and received the avails thereof.[6]

In a case already quoted, it was held at the Clinton circuit that when property, intrusted to a warehouse-man in the ordinary course of business, is lost, injured or destroyed, the weight of proof is with the bailee to show a want of

[1] Willard v. Bridge, 4 Barb. R., 361.

[2] Lockwood v. Bull, 1 Cowen R., 322; 7 id., 500; 11 Wend. R., 26; West v. Wentworth, 3 Cowen R., 82; 7 id., 295; 9 Wend. R., 271.

[3] 4 Barb. R., 361; Code of Procedure, § 111.

[4] Hawkins v. Hoffman, 6 Hill R., 586.

[5] Ross v. Johnson, 5 Burr., 2825; 1 Taunt., 391; 6 East R., 538; 6 Hill R., 588.

[6] McArthur v. Wilder, 3 Barb. R., 66; Tuttle v. Mayo, 7 John. R., 132.

fault or negligence on his part; or, in other words, to show that the injury did not happen in consequence of his neglect to use all that care and diligence, on his part, that a prudent or careful man would exercise in relation to his own property. The action was brought for the recovery of the value of property destroyed by fire in the defendants' warehouse; but as the jury found a verdict in the case for the defendants, the charge of the circuit judge was not afterwards brought in question.[1] As the rule is now well settled, the total failure of the bailee to deliver on demand is prima facie sufficient to charge him with a liability for the goods bailed; but this presumption is reversed by such evidence as shows them to have been lost; after which, the owner must show affirmatively that the loss occurred through the neglect of the bailee.[2]

Where the common carrier, who, as a general rule, is bound to deliver the goods intrusted to him, to the consignee personally at the place of delivery, cannot find him after a reasonable search, he may discharge himself from further responsibility as carrier, by placing the goods in store with some responsible warehouse-man at that place on account of the owner.[3] The warehouse-man, in such a case, becomes the bailee of the owner. If the consignee be dead or absent, or refuses to receive the goods, it is the duty of the carrier to place them in store with a responsible depositary, to the account of the owner, and subject to his order.

Goods delivered to a warehouse-man and receipted by him as such, may be transferred with the receipt, so as to vest the title and a right of action in the purchaser for their conversion; but under our old practice he could not, as we have seen, sue in assumpsit on the contract of bailment. He was compelled to bring an action sounding in tort, such as trover; in which he might give the contract of bailment in evidence for the purpose of proving his title, and showing

[1] Platt v. Hibbard, 7 Cowen R., 497; Clarke v. Spencer, 10 Watts R., 335.

[2] Schmidt v. Blood, 9 Wend. R., 268; Foote v. Storrs, 2 Barb. R., 326; Dunlap v. Hunting, 2 Denio R., 643.

[3] Fisk v. Newton, 1 Denio R., 45.

that the property was in possession of the defendant; but the contract was not regarded as the foundation of the action.[1] There having been a wrongful conversion of the goods for which that form of action would lie, the defendant might, and may still be held to bail, in whatever way the property came to his possession.

A receipt of a quantity of wheat in store, as we have seen, creates a bailment. Though it be in the form of a receipt, it is a contract, or in the nature of a contract, and therefore not open to contradiction in the sense of the rule applicable to receipts proper. The import of its terms is no doubt controllable by the usage among wheat dealers, where the usage is so universal and well known that the jury are bound to consider it parcel of the contract.[2] In all such cases the custom is proved as a means of ascertaining the meaning of the language used; and hence the terms employed must prevail in the ordinary sense attached to them, unless it it shown that these have, by a well known usage of trade, a different signification. The custom is appealed to as explanatory of the transaction, and as showing the intention of the parties.[3]

Where the warehouse-man has once incurred a liability for the negligent injury of goods stored with him for hire, he cannot relieve himself from responsibility by showing that after the happening of the injury, the goods were destroyed without his fault, and that they must have been so destroyed even if no damage had previously occurred.[4]

Where goods are delivered on an agreement that they shall be returned or paid for at an agreed price, payable in certain indorsed notes, and the person to whom they are delivered refuses either to return the goods or deliver the notes, the owner is at liberty to sue for the goods in an action in the nature of trover; and he may recover as the measure of his damages the actual value of the goods with interest from

[1] Suydam v. Smith, 7 Hill R., 182; Brown v. Treat, 1 Hill, 225.
[2] Goodyear v. Ogden, 4 Hill R., 104.
[3] Dawson v. Kittle, 4 Hill R., 107.
[4] Powers v. Mitchell, 3 Hill, R., 545.

the time of the refusal. In this action the agreed price of the goods, though high evidence of their value, is not conclusive; the contract is disaffirmed by both parties, and the defendant is justly treated as having wrongfully converted the goods to his own use, and as therefore responsible for their actual value with interest.[1]

On a note, payable in specific articles, at a stipulated price, the measure of damages in an action for its non-payment is the sum specified in the note, and not the actual value of the articles on the day stipulated for payment.[2] But the decisions on this point have not been at all uniform in the different states; some of them holding that the actual value of the articles, and not their stipulated price, is the true measure of damages.[3] Such is the rule in Tennessee and Pennsylvania.[4] Where the decisions correspond with the law, as settled in our courts, they are placed upon the ground that the parties to the contract, by specifying the price of the articles, have themselves agreed upon the measure of damages. On the other hand, the decisions which allow the current market value of the goods on the day stipulated for their delivery, as the measure of damages, proceed upon the theory that the payee has agreed for the goods, and is entitled to demand them at all events; and that therefore he ought in equity to recover their value, especially where their value has been in the meantime enhanced. Of course, the rule ought to be uniform; if the payee is permitted to recover the appreciated price when the goods have advanced in value, he should be restricted to their actual value when they have depreciated. But this would be in effect to lessen the amount of his legal demand; and thus in so far to invalidate the binding force of contracts by judicial decisions, having the validity of a law of the land; a power

[1] Stevens v. Low, 2 Hill R., 132.

[2] Pinney v. Gleason, 5 Wend. R., 393.

[3] Smith v. Smith, 2 John R., 243; Brooks v. Hubbard, 3 Conn. R., 58; Clark v. Pinney, 7 Cowen R., 681.

[4] McDonald v. Hodge, 5 Haywood's Tenn. R., 85; Edgar v. Bois, 11 Serg. and Rawles, 445; Addis. Rep., 346.

which even the state legislature does not possess, for it cannot enact any law impairing the obligation of contracts.[1] So that upon the whole view of the subject, the decisions of our courts on this point are equally just, while they are based upon a principal that can be enforced both for and against the payee, without leading to an absurd conclusion.

A bailee, who gives a receipt acknowledging that he holds the goods intrusted to him of a third person, is by that act guilty of a conversion, and he cannot afterwards claim to hold the goods on the ground of a lien for storage and charges.[2] He may, on a demand for the goods, ask for a reasonable delay for the purpose of making an inquiry, with a view to deliver them to the true owner.[3] But the delay must be asked for in good faith, and while the bailee has the power to comply with the demand for the delivery of the goods. He cannot claim a delay for any purpose, after having appropriated the goods to his own use.[4]

It is sometimes difficult, and as important as it is difficult, to determine when the duties of the warehouse-man begin, and from what time he is chargeable with the care and custody of the goods. Where he receives them from the carrier, his responsibility commences at the point where that of the carrier ends. If, by the custom of the place to which goods are directed, the carrier delivers them to the consignee, by depositing them in a warehouse, the delivery is not complete so as to discharge the carrier, until they are actually stored within the building. If a common carrier on the canals, in unloading his boat at the termination of the voyage, uses the tackle or machinery of a warehouse in hoisting the goods from his boat, he makes the machinery for that purpose his own; and if it breaks so as to injure or destroy the goods, he is responsible for the loss. His undertaking to transport them includes the duty of delivering them in safety. His respon-

[1] Constitution of the United States, art. 1, sec. 10, subdivision 1.

[2] Holbrook v. Wright, 24 Wend. R., 169.

[3] Jacoby v. Laussatt, 6 Serg. and Rawles, 300, 305; Watt v. Potter, 2 Mason 77, 81; Mires v. Solebay, 2 Mod. R., 242; Solomons v. Dawes, 1 Esp. R., 83.

[4] 24 Wend. R., 177.

sibility having begun, continues until the act of delivery is completed.[1]

But where goods are carried by a cartman to a warehouse for storage, the warehouse-man is liable for the goods lost or injured, from the time his crane is applied to raise them into the warehouse; it is no defence for him that they were injured by falling into the street from the breaking of the tackle, although the cartman who brought the goods refused to furnish slings for further security.[2] The warehouse-man is bound to see that the tackle and slings used by him are of sufficient strength and fit for the purpose; he should not apply them unless they can be made secure. The goods remain in the custody and possession of the person by whom they are sent, until they are taken in hand and removed from the cart; if the cordage with which the packages are bound is too frail to hold them together, it is the duty, it seems, of the warehouse-man to provide sufficient slings with which to hoist them with safety; and where that cannot be done, he should refuse to receive the goods.

The lowering from, and raising or hoisting of goods into the warehouse, is deemed to be done under the direction of the warehouse-man. Accordingly, where a warehouse-man at Liverpool employed a master porter to remove a barrel from his warehouse, and the master porter employed his own men and tackle, and through the negligence of the men the tackle failed, and the barrel fell upon and injured a passer by, it was held that the warehouse-man was liable in case for the injury.[3]

Where the bailee unites the business of a common carrier with that of a warehouse-man, and the goods intrusted to him are deposited in his warehouse, to be forwarded at the pleasure of the owner, the warehouse-man is not considered a gratuitous bailee, though he receives nothing for the storage.[4] And hence, where the defendant, being a carrier

[1] DeMott v. Laraway, 14 Wend. R., 225; 4 Term R., 581; 5 id., 389; 2 Kent's Comm., 604.

[2] Thomas v. Day, 4 Esp. R., 262.

[3] Randleson v. Murray, 8 Adolph. and Ellis, 109.

[4] White v. Humphrey, 11 Adolph. and Ellis, 43.

and wharfinger, received into his warehouse a certain quantity of goods of the plaintiff, consisting of hops, on an agreement that they should be conveyed by defendant's barges to London when the plaintiff should direct, at the usual freight, and that in the meantime they should be kept by defendant without charge for warehousing, it was held, in an action for not keeping the goods safely, that the defendant was not a gratuitous bailee, and that the hops, having been damaged by mice while in his custody, and through his negligence, he was responsible for the injury, even though it did not occur through his gross neglect. In this case, one business was regarded as contributing to the other, so as to charge the depositary with the character and duties of a bailee for hire.

This responsibility, however, is only for ordinary care. A, B, C and D, doing business in partnership as common carriers, agreed with S & Co., of Frome, to carry goods from London to Frome, where they were to be deposited in a warehouse belonging to the carriers, without any charge for warehouse room, till it should be convenient for S & Co. to take the goods home. The goods were carried under this agreement, and safely deposited in the warehouse at Frome; and while there were casually destroyed by fire; and it was adjudged that the depositaries were not liable for the loss.[1]

A person who receives goods into his store on an agreement to forward them, taking upon himself all the expenses of transportation, for which he receives a compensation from the owner of the goods, but has no concern in the vessels by which they are forwarded, or interest in the freight, is not a common carrier. His character is that of a depositary for hire in storing, and that of an agent in forwarding the goods.[2] Forwarding merchants generally unite these two kinds of business; and when property is deposited with them, with instructions to forward the same, they are discharged from their liability on showing that they used ordi-

[1] In the matter of Webb and others, 8 Taunt. R., 443.

[2] Roberts v. Turner, 12 John. R., 232.

nary diligence in sending on the property by responsible persons.[1]

So, where common carriers undertook to carry goods from Stourpoint to Manchester, and to forward them from thence to Stockport, and carried them according to agreement safely to Manchester, and there deposited them in a warehouse of their own, where they were destroyed by fire before an opportunity occurred to forward them, Lord Kenyon held that the liability of the carriers, as such, ceased when the goods were put into the warehouse; and that in the capacity of warehouse-men, they were not responsible for an injury arising from no want of negligence on their part.[2] The liability of the carrier ceases at the end of his route.[3]

A quantity of salt was delivered to a warehouse-man at Buffalo, being unloaded on the wharf in front of his warehouse where he had it piled up in tiers; the wharf and store were built considerably higher than the water had ever been previously known to rise; the salt remained there some days, when the warehouse-man was requested to put it in store, which it was agreed should be done unless it was soon sold; directly after, a gale upon the lake caused the water to rise so as to overflow the wharf, and wet and destroy the salt contained in the lower tier of barrels; and in an action for the property destroyed, it was shown that the injury could not have been much less if the salt had been placed within the warehouse; and accordingly the charge of the circuit judge was held to be good law, that the warehouse-man was liable only in consequence of neglect to use such care in the preservation of the salt as prudent men ordinarily take of their own property;[4] that to justify a verdict against him, the jury must be satisfied that the injury complained of was occasioned by the neglect of the depositary, either in not raising his wharf to a sufficient

[1] Brown v. Denison, 2 Wend. R., 593; Jones on Bailm., 120.

[2] Garside v. The Proprietors of the Trent and Mersey Navigation, 4 Term R., 581; Thomas v. Boston and Providence Railroad Co., 10 Metcalf R., 472.

[3] Hide v. The Trent and Mersey Navigation Company, 5 Term R., 389; Ackley v. Kellogg, 8 Cowen R., 223.

[4] Knapp v. Curtis, 9 Wend. R., 60.

height, in not rolling the salt into the storehouse, or in not securing it after the commencement of the storm; and that if they should be of the opinion that he ought to have rolled the salt into the storehouse before the storm, the plaintiff would be entitled to recover the difference between the injury which the salt received on the wharf and that which it would probably have received had it been rolled into the storehouse.

Where a quantity of ginseng, deposited in the defendant's warehouse, was destroyed by rats, notwithstanding the defendant took the precaution to shut the lid of the box every night, after it had been opened during the day by the owner for the purpose of showing it to purchasers, and adopted reasonable precautions to destroy vermin, he was holden not liable for the damage, since the responsibility of a warehouse-man is not similar to that of a carrier, and he had exerted all due and common diligence for the preservation of the deposit.[1]

The common carrier, who undertakes to carry goods for hire, is bound to deliver them at all events, unless injured or destroyed by the act of God or the king's enemies; if on the way he deposits them in a warehouse or booth, where they are destroyed by fire without his fault, he is liable unless the fire is caused by the lightning; he cannot excuse himself by showing that the fire raged with inextinguishable fury and consumed the goods and the building where they were stored, without any actual negligence on his part.[2]

The warehouse-man, receiving goods from a consignee, who has had actual possession of them, to be kept for his use, may nevertheless refuse to redeliver them, if they are the property of another.[3] But he must take care that he does not make any mistake, such as to deliver the goods to a wrong person; for in this case, whatever his intention may be, he is answerable.[4] Indeed, it has been held in the English courts that a wharfinger shall not be permitted to dispute the title of the person from whom he receives goods or

[1] Cliff v. Danvers, Peake, N. P. C., 114. [3] Ogle v. Atkinson, 5 Taunt. R., 759.
[2] Forward v. Pittard, 1 Term R., 27. [4] Lubbock v. Inglis, 1 Stark. R., 88.

merchandise;[1] if the property is taken from him by a process of law or by virtue of a paramount title, doubtless he will be able to defend himself as against his bailor.[2]

Though the carrier is liable until he has delivered the goods at the end of his route, it does not seem to be very definitely settled as to what shall be considered a delivery; the mode of delivery being in a great measure regulated by custom and the usage of trade. If he make a separate charge for the cartage from the building on the wharf in which he places them at the end of the route, to the warehouse of the consignee, he is held liable for a loss by fire till delivery made at the latter place.[3] But it has been held that the proprietors of a railroad, who transport goods over their road, and deposit them in their warehouse at the terminus of their road, without charge, until the owner or consignee has a reasonable time to take them away, are not liable as common carriers for the loss of the goods from the warehouse, but are liable as depositaries only, for want of ordinary care. In the case in which this decision was made, the consignee had sent his own team for the goods, and had taken part of them away; and the action was brought to recover the value of the balance, consisting of a roll of leather that could not be found.[4] The case was understood to involve to some extent the disputed right of the common carrier to limit his liability by a special agreement.[5]

Other bailees, such as warehouse-men and wharfingers, may, without doubt, limit their liability by a special contract or notice to that effect, as that they will not be responsible for losses caused by fire.[6] The liability and duties of innkeepers and common carriers are established on grounds of public policy, while those of other bailees are left open to modification by voluntary contracts.[7]

[1] Gosling v. Birnie, 7 Bing. R., 339; Stonard v. Dunkin, 2 Campb., 344.

[2] Edson v. Weston, 7 Cowen R., 278.

[3] Hyde v. The Trent and Mersey Navigation Company, 5 Term R., 389.

[4] Thomas v. The Boston and Providence Railroad Cor., 10 Metcalf R., 472.

[5] Wells v. The Steam Navigation Company, 2 Comst. R., 204, and the cases there cited.

[6] Per Lord Ellenborough in Maving v. Todd, 4 Campb., 225; 2 Comst. R., 209.

[7] Gould v. Hill, 2 Hill R., 623; see also 1 Kernan R., 485.

Wharfingers.

The similarity of their duties, often performed by the same persons, has occasioned the terms warehouse-men and wharfingers to be used sometimes in the books interchangeably, as if they conveyed substantially the same meaning. But this is inaccurate; the warehouse-man is a person who receives goods and merchandise into his warehouse to be stored for hire; and the wharfinger is one who owns or keeps a wharf, for the purpose of receiving and shipping merchandise to or from it, for hire.[1] In some instances, the wharfinger being the owner of a warehouse on the wharf, assumes also the duties and the character of a warehouse-man.[2] His responsibility begins as soon as he acquires the custody of the goods, and ends when he has fulfilled his express or implied contract with respect to them. What will amount to a delivery of the goods to him, so as to charge him with the custody of them, depends very much upon the custom and usages of the business. A mere delivery at the wharf is not enough, unless accompanied with express notice, under such circumstances as will imply a consent on his part to receive them.[3]

If it be according to the usual custom and understanding of the parties that the goods may be delivered by depositing them on the wharf, such a delivery, with notice, will be sufficient to charge the bailee with the custody of them. Where they are received into a warehouse situate on the wharf, to be forwarded, the bailee, it seems, does not hold them as a wharfinger; he is a warehouse-man just the same as if his storehouse stood in any other part of the city.[4] However, it is certain that some of the English cases speak of and treat such an one as a wharfinger.[5] But this is not material, since the duties incident to his situation and character are the same in either case. If he receive the goods on the wharf

[1] Bouvier's Law Dictionary.

[2] White v. Humphrey, 11 Adolph. and Ellis, 43.

[3] 4 Campb., 72; Packard v. Getman, 6 Cowen R., 757; 3 Campb. R., 414.

[4] Platt v. Hibbard, 7 Cowen R., 497.

[5] White v. Humphrey, 11 Adolph. and Ellis, 43.

as a wharfinger, to forward them when an opportunity arrives, and in the meantime stores them in his warehouse as a warehouse-man, the measure of his responsibility remains all the while the same; he is bound to exercise the ordinary diligence and care of a prudent man in their preservation.[1]

It has been sometimes said that the duties of the wharfinger are similar to those of the common carrier.[2] But the authorities do not sustain the proposition.[3] Lord Ellenborough, it is true, in one instance at Nisi Prius, where the goods had been accidently destroyed by fire while in the possession of the defendants as wharfingers and lightermen, does speak of their liability as similar to that of a carrier; but the case did not turn upon that point; it was a part of the duty of the defendants, as lightermen, to convey the goods from the wharf in their own lighters to the vessel in the river on which they were to be shipped; but it appeared in evidence, and was allowed to control the case, that the defendants had limited their responsibility, so as not to cover a loss by fire, by giving notice to the vendor of the goods to that effect.[4] The other cases cited in support of the doctrine, are simply dicta of the judges, made incidentally in the course of a trial, on principles not involved in the decision of the court.[5]

This distinction between the argument of the judge and the judgment of the court is always material. On the precise issue presented, the judicial decision is the authoritative witness of what the law is; but the argument with which it is sustained is only matter of illustration, that derives its weight from the individual character of the judge and the inherent force of his reasoning.[6]

[1] 11 Adolph. and Ellis, 43; Matter of Webb and others, 8 Taunt. R., 443; 2 Moore R., 500; 7 Cowen R., 497; Quiggin v. Duff, 1 Mees. and Welsb., 174.

[2] Maving v. Todd, 1 Stark R., 59; 5 Burr, 2827; Isaack v. Clerk, Moore, 841.

[3] Roberts v. Turner, 12 John R., 232.

[4] 1 Stark R., 59; 4 Campb. R., 225.

[5] Ross v. Johnson, 5 Burr, 2827; Isaack v. Clerk, Moore, 841.

[6] 7 Cowen R., 502, note b.

The wharfinger is not responsible for goods casually burnt upon his premises. But where he gets them insured against fire, being paid for storage, and authorized to sell them, and they are burnt up and the insurance money is paid to him, the owner may recover against the wharfinger for the value of the goods to the extent of the insurance,[1] deducting of course his lien and expenses. His liability commences with the delivery of the goods into his custody; but what will be considered a delivery depends in a great measure upon the custom and usages of the business. Where goods are ordered from a distance, or purchased to be forwarded, the delivery to the wharfinger or common carrier, must be such as to render the bailee responsible to the consignee of the goods.[2] A delivery at the wharf is not sufficient to charge the purchaser, unless the seller procures them to be booked, or takes a receipt for them, or delivers them in such a manner as to furnish a remedy over against the wharfinger. Doubtless a delivery to the known agent of the carrier or wharfinger, will be deemed sufficient; but a delivery to a person on the wharf, not known to be such agent, is not good.[3] A tradesman at one port receiving an order to forward goods to a person at another port, by a common sea carrier, does not sufficiently perform the order by depositing the goods at the receiving house of such carrier, with directions to forward them to their place of destination, if the goods being much above the value of five pounds, to which the carrier's liability was notoriously limited, be not specifically entered and paid for accordingly; for such tradesman has an implied authority, and it is his duty to pay any extra charge necessary to insure the responsibility of the carrier to the party from whom he received the order, though only general in the terms of it; and in case of non-delivery by the carrier, whose responsibility was lost for want of such special entry and payment, the tradesman cannot recover the value of the goods against the person from whom the

[1] Sidaways v. Todd, 2 Stark. R., 351.
[2] Buckman v. Levi, 3 Campb. R., 414.
[3] 3 Campb. R., 414,

order was received.[1] The carrier has a right to make such a rule to regulate the mode in which he will receive goods for transportation; and he will not be held liable where it has been evaded.

Where the owners of a wharf provide the men to do the work of unloading vessels, and permit no others to be employed thereon, they are responsible for the negligence of their servants, in unloading the goods, although they derive no profit from their labor.[2] By keeping the wharf and furnishing the men, they make the business their own, and must answer for losses occuring through the negligent manner in which it is done.

In Cobban v. Downe, it was held, where goods are to be carried coastwise, and the usage of the wharf is to deliver them on the wharf to the mate of the ship by which they are to be carried, that by a delivery to the mate, the wharfinger's responsibility is at at an end, and he is not liable, though the goods are lost from the wharf before they are shipped.[3] The facts of the case were these: plaintiff sent four trusses to the wharf, one of which was lost; they were directed to be sent by the ship George to Iverness in Scotland; the goods were brought to the wharf, and laid at the door of the counting-house; while they lay there the mate of the ship was called, and the truss in question delivered to him. Lord Ellenborough: "This is an action, charging the defendant, in his character as a wharfinger. What the duty of a wharfinger is, is to be measured by the usage and practice of others in similar situations, or his known and professed liability. Every man contracts with the public according to the known and ascertained extent of the trade or business in which he is engaged. The defendant has proved that by established usage, the goods are delivered by the wharfinger to the mate and crew of the vessel which is to carry them; from which time, it has been considered, his responsibility is at an end. Undoubtedly, where the re-

[1] Clark v. Hutchins, 14 East. R., 475.

[2] Gibson v. Inglis, 4 Campb. R., 72; Coggs v. Barnard, 2 Ld. Raym., 909.

[3] 5 Esp. R., 41.

sponsibility of the ship begins, that of the wharfinger ends; and a delivery to the ship creates a liability there; but the delivery must be made to an officer or person accredited on board of the ship; it cannot be made to the crew at random; but the mate of the ship is a recognized officer, and therefore the delivery to him is sufficient to discharge the wharfinger."

The law exacts of wharfingers the exercise of ordinary diligence in the preservation of the goods and merchandise intrusted to them.[1] Where they are merely depositaries for hire, it is enough if they take common and reasonable care of the commodity intrusted to them.[2] The liability of a wharfnger is not distinguishable from that of a warehouse-man; both are bound to take common and reasonable care of the goods delivered to them. What will be regarded as ordinary care and diligence, is generally a question of fact for the jury, to be determined from the circumstances of the case. The wharfinger, of course, will not be required to take the same care of lumber received and piled upon his wharf, as he takes of merchandise and such goods as may be easily purloined and stolen. The nature of the article, the time of the deposit, and the dangers to which it is exposed, are all proper circumstances to be considered in determining the diligence demanded of the bailee; for in this manner alone can it be ascertained that he has exercised, or failed to exercise, the ordinary care and diligence of a prudent man.[3] A loss, occurring through his failure to exercise that degree of care, renders him liable.[4]

As his liability, and that of a warehouse-man, are regulated by the same rule, the decisions in respect to the liabilities of warehouse-men are in point to illustrate his duties in taking care of the articles bailed.[5] They are to use ordi-

[1] Story on Bailm., § 451; Hatchett v. Gibson, 13 Ala. R., 587; Duckner v. Barnett, 5 Miss. R., 97; Clark v. Spence, 10 Watts R., 335; Blin v. Mayo, 10 Verm. R., 56; Hemphill v. Chenie, 6 Watts and Serg., 62, 75.

[2] Foote v. Storrs, 2 Barb. R., 326.

[3] 7 Cowen R., 497; 2 Barb. R., 326; Jones on Bailm., 5, 6, 21, 22.

[4] White v. Humphrey, 11 Adolph. and Ellis R., 43; Quiggen v. Duff, 1 Mees. and Welsb., 174.

[5] 8 Taunt. R., 443; 8 Adolph. and Ellis R., 109; 4 Esp. R., 262.

nary diligence in keeping and guarding the property, while in their possession, and in delivering or forwarding it; having used such diligence they are no longer liable,[1] though the goods be destroyed by fire, stolen by thieves, or embezzled by the person having them in charge.[2]

A contract to forward goods from New-York to Fairport in Ohio, makes the forwarder a common carrier for the whole route, and renders him liable as such, notwithstanding his transportation line extends only part of the distance, and the loss occurs on a part of the route in which he is not interested.[3] He is liable in this case for all the dangers incident to the transhipment of the goods, or their temporary storage by the way, not as a wharfinger or warehouse-man, but as a common carrier.[4] In the absence of any special agreement, the carrier discharges himself from further responsibility by forwarding the goods at the end of his line by the ordinary conveyance, or pursuant to his instructions.[5] Not so, where he contracts to carry the goods to their place of destination.[6] If he contract to carry from New-York to Ogdensburgh, and his line terminates at Oswego, he does not cease to be a carrier, so as to become only a forwarder of the goods from the latter place. His contract binds him, and it is a matter of no moment, whether he uses his own, or employs the vessels of other persons to carry them part of the way, or even the entire route.[7] He is answerable as a common carrier to the extent of his undertaking; if he agrees to carry from Saratoga Springs to Albany, he is not permitted to say that his road or route terminates at Schenectady; he is a carrier for the distance he engages for.[8]

[1] Brown v. Denison, 2 Wend. R., 593; 12 John. R., 232; 8 Cowen R., 223.

[2] Schmidt v. Blood, 9 Wend. R., 268; 4 Esp. R., 262; 4 Term R., 581; Peake's N. P., 114; 1 Esp. R., 315; 19 John. R., 44; 7 Cowen R., 497; 17 Mass. R., 500.

[3] Wilcox v. Parmelee, 3 Sand. R., 610.

[4] Muschamp v. Lancaster Railway Co., 8 Mees. and Wels. R., 421.

[5] Ackley v. Kellogg, 8 Cowen R., 223; St. John v. Van Santvoord, 6 Hill R., 157.

[6] Fairchild v. Slocum, 19 Wend. R., 329; and Weed v. S. and S. Railroad Co., id., 535.

[7] 19 Wend. R., 332.

[8] 19 id., 534; Welland Canal Co. v. Hathaway, 8 Wend. R., 483.

The doctrine of an estoppel *in pais* applies to one who enters into such a contract; he is concluded from denying his own acts or admissions, which are expressly designed to influence the conduct of another, and do so influence it, when such denial will operate to the injury of the latter.[1]

For the convenience of business common carriers, by arrangements among themselves, frequently advertise and undertake to carry goods from the Atlantic cities to the various Western ports and places of destination. When this is done, the carrier is liable for the delivery of the goods according to his agreement.[2] But if there be no special agreement, the carrier is liable for their transportation only over his route.[3] But at the end of his route he must forward them by a reliable and responsible carrier, pursuant to his instructions. or if there be none given, in the usual and customary conveyance.[4] He is to be considered a forwarder from the place where his line terminates; but if the goods are to be delivered to a consignee at that place to forward, he is not discharged from his liability as a carrier until he has actually delivered them; and it is not enough for him to deliver them on the wharf and give notice to the consignee; it is his duty to attend to the actual delivery of the goods.[5]

The transhipment or delivery of the goods at the end of the route must, to a degree, be regulated by the usage or custom of the business;[6] but it has been questioned whether the custom of business should be allowed to have the same effect, in fixing the liability of parties, in the transhipment of goods on our internal lines of river, lake and canal navigation, as it receives when applied to the business of our seaports.[7] In Pennsylvania, a custom will not be tolerated that tends to endanger the safety of goods and merchandise,

[1] Per Mr. Justice Nelson, 19 Wend. R., 483.
[2] Wilcox v. Parmelee, 3 Sand. R., 610.
[3] St. John v. Van Santvoord, 6 Hill R., 157; 19 Wend. R., 329.
[4] 8 Cowen R., 223; 6 Hill R., 157; 19 Wend. R., 329, 535.
[5] Hemphill v. Chenie, 6 Watts and Serg. R., 62.
[6] 6 Hill R., 160.
[7] 6 Watts and Serg. R., 62.

sent by a common carrier to a distant place and requiring transhipment.

There is, it seems, an implied engagement by a consignee, where he assumes to transact a general forwarding business, that he will be vigilant and careful in receiving and forwarding goods intrusted to his care; and upon his refusing to receive goods consigned to him, he would be liable to an action by the owner for any loss which might be sustained thereby.[1] The safety of the property, and the convenience of business, require that the owner should be furnished with a sure remedy in cses of loss; and there is no objection if it be sometimes cumulative.

The consignee becomes responsible for the custody of the goods from the time they have been legally delivered to him. Where a consignee received a quantity of salt in barrels, storing it in his warehouse in Louisville, to be sold on commission, and an entry was made into the building by pulling off a plank, opening the door, and at three or four different times, a large number of barrels were stolen, it was held that the consignee was liable, not having used ordinary diligence to preserve the salt.[2]

Evidence of Loss.

In an action against a warehouse-man or forwarding merchant, to recover the value of a lost trunk, the plaintiff is a competent witness to prove the contents of it; but this rule is limited and controlled by circumstances respecting the nature of the contents; it will only extend to such articles as are ordinarily necessary for the convenience and use of a traveler. In such action the law will not intend negligence on the part of the bailee who will be presumed to have acted according to his trust, until the contrary is shown.[3] But to throw the burden of proof on the bailor, it is necessary that the bailee should show clearly how the

[1] 6 Watts and Serg. R., 62,

[2] Chenowith v. Dickinson, 8 B. Mon. R., 156; Blin v. Mayo, 10 Verm. R., 56.

[3] Clark v. Spence, 10 Watts R., 335; Bul. N. P., 181; Herman v. Drinkwater, 1 Greenleaf, 27; 5 Rawle, 179.

goods were lost.[1] All the bailor has to do, in the first instance, is to prove the contract and the delivery of the goods; and this throws the burthen of the proof, that they were lost, and the manner of the loss, on the bailee, of which courts usually require very plain proof. The bailee is responsible, if he by mistake deliver the things bailed to the wrong person; and a forged order for them will not protect him.[2]

For the purpose of laying the foundation for the admission of secondary evidence, the loss of a paper or the death of a witness, may be proved by an interested person or even a party to the record; the reason heretofore given for this exception to the general rule is that this evidence is addressed to the court.[3] It is not given on a point on which the jury are to pass, and, hence, it cannot be supposed to influence their verdict.[4] The witness testifies to the court upon a preliminary point, with a view to the introduction of further testimony, sufficient to establish the main issue.[5] There is another large and definite class of cases in which necessity has always been held to authorize the calling of interested witnesses; such witnesses are admitted, because, from the nature of the case, it is exceedingly improbable that any person not interested should possess any knowledge of the facts.[6] And for a similar reason, a party to the suit may be a witness himself to prove the contents of a lost trunk, consisting of such articles as are ordinarily necessary for the convenience and use of a traveler; this is permitted from the necessity of the case, since no other person is likely to know what were its contents.[7]

The general rule is, that neither the wharfinger nor warehouse-man can deny the title of the person from or for whom

[1] 1 Esp. R., 315; 5 Barn. and Cres., 322; 3 East R., 192; 3 Taunt. R., 264; 2 Strange, 1099.

[2] Lubbock v. Inglis, 1 Stark. R., 83; 10 Watts, 335; 5 Rawle, 179.

[3] Jackson v. Davis, 5 Cowen R., 126; Blade v. Noland, 12 Wend. R., 173.

[4] Jackson v. Frier, 16 John R., 194.

[5] Chamberlain v. Gorham, 20 John R., 144.

[6] 15 Wend. R., 316; 2 Stark Ev., 753, 767, 8, n. 2; 2 Denio, R., 119.

[7] Clark v. Spence, 10 Watts R., 335 and the cases there cited.

he receives and holds goods or merchandise.[1] The wharfinger is the agent of the person of whom he receives the goods, and cannot dispute the title of his principal in an action brought by the principal against him;[2] nor can he dispute the right of one who has taken an assignment of his receipt, with an order from his principal for the goods, especially not after he has seen the order and promised to deliver them.[3] He is not permitted to dispute the title of the person from whom he recives the property; for that is the title under which he holds, and, like the tenant, he is not allowed to invalidate the title under which he derives his own rights. Having acknowledged certain timber on his wharf to be the property of the plaintiff, it has been held that the wharfinger cannot deny his title in an action of trover for the property;[4] for by such admission he concedes that he holds, subject to the plaintiff's order.

But though the wharfinger cannot, as an agent, dispute the title of his principal, this cannot protect the goods thus received from an execution against the person depositing them, nor render either the warehouse-man or wharfinger liable, where the goods are taken from his custody by legal process. If they are taken from him by authority of law, as the property of a third person, the bailee may show this in defence of an action brought against him by the bailor of the goods.[5] Doubtless, as a faithful agent, he is bound to notify his principal of the proceeding; but he is not compelled to defend his title, nor to answer for his property at all events; for that would be to cast upon him the burden of guaranteeing the title of the person from whom he derives only a possessory interest. If the goods are in fact the property of another, he may refuse to deliver them; but he thereby takes upon himself the *onus* of establishing a superior title.[6]

[1] Burton v. Wilkinson, 18 Verm. R., 186.

[2] Goslin v. Birnie, 7 Bing. R., 339; Hall v. Griffin, 10 Bing. R., 246; Harmon v. Anderson, 2 Campb., 243; Stonard v. Dunkin, 2 id., 344.

[3] Hall v. Griffin, 10 Bing. R., 246.

[4] 7 Bing. R., 339.

[5] 18 Verm. R., 186.

[6] Ogle v. Atkinson, 5 Taunt. R., 759.

The Lien of wharfingers and warehouse-men.

The general principle of the common law is, that where the bailee expends labor and skill in the improvement of the subject delivered to him, he has a lien for his charges.[1] The tailor and the shoemaker have such a lien on the shoes and clothes made out of leather or cloth left with them to be made up; a trainer, too, it is held has a lien on a race-horse for his charge in keeping and training him; but a livery stable keeper has no such lien.[2] This lien, however, is such that it is lost by a voluntary surrender of the property, or by a sale on an execution in favor of the party holding the lien.[3] It is specifically for the work done and the expenses incurred, for or upon the thing bailed.

Other bailees, such as a common carrier, a wharfinger and warehouse-man, also have a lien upon the goods intrusted to them by a special custom, to the extent of their charges.[4] The warehouse-man's lien is specific, not general; but he may deliver a part, and retain the residue for the price chargeable on all the goods received by him under the same bailment, provided the ownership of the whole is in the same person.[5] But a wharfinger, it seems, has a general lien on the goods of his customer in his possession, for his balance in respect of freight and wharfage;[6] it is doubtful whether a lien for warehouse-room stands on the same footing. Where chattels are deposited with a party who claims a lien on them after notice from the bailor of the sale of them to a third party, the bailee, a wharfinger, cannot, as against the vendee, claim a further lien in respect of a debt incurred to him by the bailor after such notice, though the chattels remain in his books in the name of the bailor.[7]

[1] Bevan v. Waters, Mood. and Salk., 235.

[2] 2 Ld. Raym., 866.

[3] Jacobs v. Lawton, 5 Bing. R., 130.

[4] Story on Bailm., § 588; Steinman v. Wilkins, 7 Watts and Serg. R., 466; Johnson v. The Schooner M'Donough, Gilpin R., 101.

[5] 7 Watts and Serg. R., 466; Schmidt v. Blood, 9 Wend. R., 268.

[6] The King v. Humphrey, 1 McSel. and Young, 173.

[7] Barry v. Longmore, 4 Perr. and Dav., 344.

The wharfinger has a lien on a vessel for wharfage; and if the vessel is removed from the wharf secretly or wrongfully, and afterwards brought back without force or fraud, the wharfinger's lien is revived.[1] If the wharfage be not paid by the agent or factor shipping goods, according to custom, it may be recovered by the wharfinger from the owner of the goods.[2] The lien is given him as a means of collecting his charges, but the debt may continue, though the lien is discharged.

The law does not favor a general lien, which is founded on custom, for a balance of accounts; and hence it is not allowed, unless it be established by clear evidence of a settled and uniform usage.[3] The usage must be such as will warrant the inference that the party against whom it is claimed had knowledge of it. It arises generally either from express contract, or is implied, from the manner of dealing between the parties, or from the usages of trade, which are presumed to enter into and become a part of the contract.[4] It is the very essence of the lien, that the person claiming it has the possession of the chattel upon which the lien is claimed to operate.[5] A lien by express contract, is enforced like any other valid stipulation;[6] and while it exists the party holding it must retain the possession of the goods on which the lien attaches.[7] By surrendering the property, he divests himself of his lien;[8] for his lien is not an estate or interest in the property; it is neither a *jus ad rem*, nor a *jus in re*, but a simple right to retain the property till the lien thereon be discharged.[9] The factor has a specific lien on the goods intrusted to him, for his charges incurred on their account; a general lien on the goods in his possession for a balance of

[1] Gilpin R., 101.

[2] Fitzsimmons v. Milner, 2 Rich R., 370.

[3] 2 Kent's Comm., 636, 637; Rushforth v. Hadfield, 6 East R., 519; 7 East R., 224; Bleadon v. Hancock, 4 Carr. and Payne R., 152.

[4] Jarvis v. Rogers, 15 Mass. R., 389, 394.

[5] Jordan v. James, 5 Ham. R., 88.

[6] Kirkman v. Shawcross, 6 Term R., 14.

[7] 2 Kent's Comm., 638; Houghton v. Matthews, 3 Bos. and Pull. R., 485.

[8] Jones v. Pearle, Str. R., 556; 1 East R., 4.

[9] Meany v. Head, 1 Mason R., 319.

account against his principal; and also a lien upon the proceeds of his principal's property sold by him as a factor.[1]

The warehouse-man is not, like a carrier, bound by any custom of the realm, nor to be considered as an insurer; his lien is founded on usage, repeatedly proved and recognized until it has come to be considered an established right.[2] It is a specific lien; but where a quantity of any particular kind of merchandise is stored in a warehouse, and portions of it are from time to time delivered out without the storage thereon being paid, the warehouse-man has a lien upon the portion left for the storage of the whole. It is one transaction, and the lien covers the whole of the goods deposited, and may rest upon each part for the entire claim.[3] This rule is considered as promoting the convenience of trade and business, without detriment to the parties in interest, and without subjecting them to the inconvenience and trouble of dividing up a single transaction into as many parts as there may have been different deliveries of portions of the same property.[4]

HIRE OF THINGS.

One who hires goods or chattels for use acquires a possessory interest in them during the term of his contract;[5] he in fact contracts for, or purchases the use of the chattels for the period or purposes of the contract.[6] The price paid is the consideration for the use; so that the hirer becomes the temporary proprietor of the things bailed. One who hires a flock of sheep for a year, acquires the right to the increase of the flock;[7] and an interest in them, which, for the time being, entitles him to hold them against the owner himself. It is a bailment of mutual interest, and reciprocal obligation.

[1] 6 Term R., 262; 3 Bos. and Pull. R., 489; Cowp. R., 251; 3 Harr. and John. R., 339.

[2] Naylor v. Mangles, 1 Esp. R., 109; Spears v. Hartley, 3 id., 81.

[3] 9 Wend. R., 268.

[4] 4 Burr., 2221; 3 Bos. and Pull., 494; 6 Term R., 262; Jeremy on Carr., 78, 90

[5] Putnam v. Wyley, 8 John. R., 432, 435.

[6] Jones on Bailm., 86.

[7] Wood v. Ash, Owen, 138; 8 John., 435.

Where one delivers personal property to another, to be returned after a certain time, at the expiration of the term the same identical property reverts to, and the title is in the bailor; and he may take it from one having a wrongful possession, without being liable to an action of trespass. It is otherwise where the contract of the bailee is in the alternative; either to return the property bailed or deliver property of the same kind and quality; or where the contract is to do the latter only. In either of these cases, the obligation on the part of the bailee rests in contract; and till he actually make the delivery, though the term has expired, the bailor has no vested interest in the property.[1] Where by the agreement the identical thing is to be returned, the contract amounts to a kind of lease of personal property, at a rent, for a term, after which the property in the thing reverts, as it were, to the lessor.[2] In such a case, the bailor may take or recover back the article bailed as soon as the time of the bailment has expired; but till then his right of property, or control over the property, is suspended. But where the bailee is to return another article of the same kind, or has an option to return the same or another, the property passes; it is the case of a sale or exchange; the person making the transfer acquires a property in the price, and parts with his title or interest in the specific thing; on its return or redelivery it is regarded as a payment, not a reversion. And when a payment is to be made in specific articles, the title does not pass until the articles have been separated from others, set apart and actually delivered to the payee, or tendered to him.[3] If anything remains to be done, the delivery is not perfect, and the title does not pass.[4]

[1] Hurd v. West, 7 Cowen R., 752.

[2] 7 Cowen R., 756, note a. In Seymour v. Brown, it was held that the title to wheat was not changed, where it was delivered on an agreement, that the person receiving it should for every five bushels of wheat deliver in exchange one barrel of flour; but that case is overruled; see Norton v. Woodruff, 2 Comst. R., 153.

[3] Barns v. Graham, 4 Cowen R., 452; Slingerland v. Morse, 8 John. R., 477; Co. Litt., 210, b.

[4] McDonald v. Hewett, 15 John. R., 349.

The distinction between executory and executed contracts is well defined; the former conveys a chose in action, the latter a chose in possession. In order to determine whether a particular agreement belongs to one or the other of these two classes, the usual and decisive test is to consider at whose risk the subject of the contract is left, under its provisions.[1] In the case of a sale, or exchange of property, which amounts to a sale, the risk is with the person to whom it is delivered; but where there is only a bailment for a time, after which the identical chattels are to be returned, the risk remains with the bailor.[2] If, on the contrary, similar things, of the same value and quality, are to be returned in place of those received, the risk is with the person to whom the goods are delivered, and the property in them passes to him, who must bear the loss, if they be destroyed by wreck, pillage, fire or other inevitable misfortune.[3]

Any damage befalling a chattel while in the hands of a bailee, without his misconduct, and while the chattel is employed in the use for which it was bailed, must be sustained by the bailor. As, if a horse be hired to go a journey, and, during the prosecution of the journey without any ill treatent by the hirer, become lame, the hirer is not answerable for damages.[4]

The main obligations of the letter to hire, *locator rei*, deduced from the nature of the contract, are, to deliver the thing to the hirer; to refrain from every obstruction to the use of it by the hirer, during the period of the bailment; to do no act which shall deprive the hirer of the thing; to warrant the title and right of possession to the hirer, in order to enable him to use the thing or perform the service; to keep the thing in suitable order and repair, for the purposes of the bailment; and, finally, to warrant the thing free from any fault inconsistent with the proper use or enjoyment of it.[5] The obligation to keep the thing in suitable repair for

[1] Jackson v. Myers, 3 John. R., 388; Jackson v. Clark, id., 424; id., 44.
[2] 8 John. R., 431, 432; 7 Cowen R., 752; 9 id., 687.
[3] Jones on Bailm., 64, 65.
[4] Millon v. Salisbury, 13 John R., 211.
[5] Harrington v. Snyder, 3 Barb. R., 380; Story on Bailm., § 383.

the purposes of the bailment, is considered as arising, by operation of law, from the fact that the enjoyment or use contemplated by the contract cannot otherwise be obtained. Thus, if a hired horse is taken sick on a journey agreed on, without the fault of the hirer, the expenses which are bona fide incurred for his medicine, nourishment and care, during his sickness, are to be borne by the letter to hire; whether the horse recovers or dies of the malady.[1]

The engagements of the party taking a thing to hire, *conductor rei*, are to put the thing to no other use than that for which it is hired; to use it well; to take care of it; to restore it at the time appointed; to pay the price or hire; and in general to observe whatever is prescribed by the contract, or by law, or by custom. The bailment being one of mutual benefit, the hirer is only responsible for that degree of diligence which all prudent men use, in their own affairs. The man who hires a horse is bound to ride it moderately, and to treat it as carefully as any man of common discretion would his own, and to supply it with suitable food. And if he does so, and the horse in such reasonable use is lamed or injured, he is not responsible for any damages; but on the contrary, if the horse break down, or become disabled on the road, and the bailee be compelled to leave him at a public house to be kept and doctored for several days at his expense, and to procure other means of returning home, it is held that in an action against the bailee to recover the price of the hire, he may recoupe these expenses against the demand of the bailor.[2]

Ordinary expenses are to be borne by the hirer for use; unless the manner and circumstances of the contract be such as to imply a different agreement. If a person lets his carriage and horses, to be driven by his own servants, they are in his care still, and he must be at the expense of keeping the horses shod.[3] But the time for which the chattels are hired, and the use to which they are to be applied, will generally indicate the understanding of the parties, so as to

[1] 13 John R., 211; 3 Barb. R., 281; Story on Balm., § 384 to 386.
[2] 3 Barb. R., 381; Story on Bailm., § 389; 2 Kent's Comm., 586, 587.
[3] Code of Louisiana, art., 2662, 2663.

imply an agreement in respect to the expenses and ordinary repairs. On this point the provisions of the civil code are quite specific and minute.[1] While at common law the liabilities of the bailee, in this particular, do not appear to be very accurately defined.[2] If the chattels be hired for a length of time, the inference would seem to be that the hirer undertakes to keep the things in ordinary repair as he would his own property.

One who hires chattels for use, must confine himself to the use for which he stipulates. As, if he hire a horse to go a certain distance, or to a particular place, but goes farther, he is liable in trover for an unlawful conversion; but if the owner of the horse receives payment for the whole distance traveled, he thereby ratifies the act of the hirer in going farther than the original contract allowed, so that an action in the nature of trover will not lie; and if the hirer has injured the horse on the journey by ill usage, the owner's remedy is by an action for the misfeasance.[3]

The rule is the same though the hirer be an infant; for it is held that an infant who hires a horse to go to a place agreed on, but goes to another place in a different direction, is liable in trover for an unlawful conversion of the property.[4] So when an infant took a mare on hire, and drove her with such violence and otherwise cruelly treated her, so that she died, it was held that though neither case nor assumpsit would lie, an action of trespass might be maintained against him. An action grounded on the contract, cannot be maintained against him, on account of his infancy; but where he does a positive and willful act, amounting to an election on his part, to disaffirm the contract of hiring, the owner is entitled to the immediate possession, and may maintain an action of trespass against him for the tort.[5]

[1] Code of Louisiana, art., 2646, 2662, 2664, 2665.

[2] 2 Kent's Comm., 586.

[3] Rotch v. Hawes, 12 Pick R., 136.

[4] Homer v. Thwing, 3 Pick R., 492.

[5] Campbell v. Stakes, 2 Wend. R., 137; Jennings v. Randall, 8 Term. R., 335; Green v. Greenbank, 4 Eng. Com. Law R., 375; 2 Marsh R., 485; Vasse v. Smith, 6 Cranch R., 226.

The action on the case cannot be maintained against him, because it assumes that he has a right to the possession of the property under the contract of hiring; and he is not answerable as for a breach of his contract.

Notwithstanding the hirer, for use, is confined to the use for which he stipulates, as where he hires a horse for a certain time to go to a particular place, the owner cannot justify taking the horse violently, within the time, though the hirer go to a different place.[1] In this case, however, the horse was hired for two days at four shillings to go from Gravesend to Nettlested, and the hirer, after riding a mile or so on the right road, turned deceitfully towards London, and the owner, meeting him on the way, took the horse from him by force; and it was held that the hirer had acquired an interest in the horse for the two days, and that the remedy of the letter to hire, for the violation of the contract, was by an action on the case. So, where goods, leased as furniture with a house, have been wrongfully taken in execution by the sheriff, the landlord cannot maintain an action of trover against the sheriff, pending the lease; because, to maintain such an action, he must have the right of possession as well as the right of property at the time.[2] Neither can he in such a case maintain the action of trespass, for the reason that he retains only a reversionary interest in the goods, and has no present right in them.[3] The rule is different in respect to property loaned to another for an indefinite term; here the owner may maintain an action for the trespass in taking it.[4] So, also, the owner may maintain an action, either in the nature of trover or trespass, against a third person who has taken his property from the possession of his agent, with whom he has temporarily deposited it for custody.[5]

The owner of a chattel, let for a term on hire, may recover in an action against a stranger, pending the contract

[1] Lee v. Atkinson and Brook, Yelv., 172.
[2] Gordon v. Harper, 7 Term R., 9.
[3] Putnam v. Wyley, 8 John. R., 432, 435; Ward v. Macauley, 4 Term R., 489.
[4] Orser v. Storms, 9 Cowen R., 687.
[5] Thorp v. Burling, 11 John. R., 285.

of bailment, on establishing an injury to his reversionary interest.[1]

The action for the trespass, of unlawfully taking personal property, can only be sustained by the party who has a present right of possession, for the act of seizing the property. An officer who, having levied upon and taken goods in execution, receives from the defendant the amount due on the execution, does not become a trespasser *ab initio*, by refusing to restore them, after his authority to detain them is determined.[2]

Liability in respect to servants.

According to the rules of the common law, every man is responsible for injuries occasioned by his own personal negligence, and for acts done by those whom the law denominates his servants, while engaged in the business or work for which he employs them.[3] Where the owner of a carriage hires of a stable keeper a pair of horses to draw it for a day, and the owner of the horses provides a driver, through whose negligent driving an injury is done to a horse belonging to a third person, it is held that the owner of the carriage is not liable to be sued for such injury, because the driver is not his servant.[4] But the owner of the horses, who employs and sends his servant to drive them, is liable for all injuries occurring through his neglect.[5] Being liable for accidents arising from the misconduct or negligence of the driver, the horses are still in the possession of the owner of them, and under his care and control; and he may therefore maintain trespass *vi et armis*, for an injury done to his horses while so employed, and even against the person who has hired them.[6] The driver is his servant just the same, though not under his immediate superintendence.[7]

[1] Lacoste v. Pipkin, 13 Smedes and Marshall R., 589.
[2] Gardner v. Campbell, 15 John. R., 402.
[3] Sammell v. Wright, 5 Esp., 263; Dean v. Brauthwaite, id., 35.
[4] Langher v. Pointer, 5 Barn. and Cres., 547.
[5] 5 Esp., 263.
[6] 5 Esp., 35.
[7] 5 Barn. and Cres. R., 547.

So, where the owners of a carriage were in the habit of hiring horses from the same person to draw it for a day, or a drive, and the owner of the horses provided a driver, through whose negligence an injury was done to a third party, it was adjudged that the owners of the carriage were not liable to be sued for such injury, and that it made no difference that they had always been driven by the same driver, or that they had paid him the same sum each time; or that they had furnished him with a livery which he had left at their house on returning from each drive.[1] It is not necessary that the servant should be employed by the master in person, or that he should be under his immediate and personal superintendence, in order to render him liable for injuries caused by his servant's neglect. The owners of a ship are responsible for goods spoiled through the default of the master of the ship, employed by them;[2] and a warehouse-man is answerable for the acts of a master porter, engaged in lowering goods out of his warehouse;[3] for in each of these cases the employee is deemed the servant of his employer.

Gibson v. Inglis; the London Dock Company are liable for the negligence of their servants in unloading goods, although the company derive no profit from their labor; but that company provides the men to do the work, and no others are permitted to be employed; and for this reason, on the principle of Coggs v. Bernard, Lord Ellenborough held that the company was liable, although they derived no advantage from the labor of their servants.[4]

The principal is held liable for the acts of his servant, on the ground that his servant is supposed to act under the direction of his employer. In Quarman v. Burnett, the court hold that, upon the principle, that *qui facit per alium facit per se*, the master is responsible for the acts of his servant;

[1] Quarman v. Burnett, 6 Mees. and Welsb. R., 499.

[2] Boson v. Sandford, 2 Salk. R., 440.

[3] Randleson v. Murray, 8 Adolph. and Ellis R., 109; Thomas v. Day, 4 Esp. R., 262.

[4] 4 Campb. R., 72.

and that person is undoubtedly liable, who stood in the relation of master to the wrong-doer; he who had selected him as his servant, from the knowledge of, or belief in his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey; and whether such servant has been appointed by the master directly, or intermediately through the intervention of an agent authorized by him to appoint servants for him, can make no difference. But the liability by virtue of the relation of master and servant must cease where the relation itself ceases to exist; and no other person than the master of the servant can be liable, on the simple ground that the servant is the servant of another, and his act the act of another; consequently, one entering into a contract with another, which does not raise the relation of master and servant at all, is not thereby rendered liable.[1]

The immediate employer of the agent or servant, through whose negligence an injury occurs, is the person responsible for the negligence of such agent or servant. To him the principle *respondeat superior* applies, for there cannot be two masters severally responsible in such case.[2] A builder, employed to execute certain alterations in a house, including the propositions for and the fixing of gas fittings, and who makes a contract with a gas fitter, to execute that part of the work, does not stand in the relation of master to the gas fitter, so as to be responsible to a third person for an injury caused by an explosion of the gas, through the negligence of the person engaged in doing the work; the gas fitter is not a servant, acting under the immediate direction of his employer, but merely a sub-contractor.[3]

[1] 6 Mees. and Welsb. R., 499. This case contains a review of the cases bearing on this point. Langher v. Pointer, 5 Barn. and Cres. R., 547; Bush v. Steinman, 1 Bos. and Pul. R.. 404; Sly v. Edgeley, 6 Esp. R., 6; Randleson v. Murray, 8 Adolph. and Ellis R., 109; Rapsin v. Cubit, 9 Mees. and Welsb. R., 710; Milligan v. Wedge, 12 Adolph. and Ellis R., 737; 10 Mees. and Welsb. R., 109; 4 Welsb. Hurls. and Gordon R., 255.

[2] Blake v. Ferris, 1 Selden R., 48, and the cases there cited.

[3] Rapson v. Cubitt, 9 Mees. and Welsb. R., 710; Milligan v. Wedge, 12 Adolph. and Ellis R., 737; The Mayor, &c., of New-York v. Bailey, 2 Denio R., 433; 1 Selden R., 369, 492.

Neither does the rule apply, so as to render the principal liable to one of his agents or servants for injuries sustained through the negligence of a fellow servant, engaged in the same general employment.[1] The liability of the principal, of which we are speaking, for losses caused by the negligence or misconduct of his servants, is grounded upon the right which he possesses of directing and controlling their conduct; and he is compensated in part for this responsibility which the law imposes upon him for their acts, by the right which it assures to him, against all persons who may attempt to deprive him of the service of those whom he has employed.[2] The man who is hired by the year at a fixed salary, though of full age, holds the legal relation of a servant to his employer.[3] And the relation is the same, though the hired man, having a family, is permitted under the agreement to occupy a house belonging to his employer.[4]

Acts of non-feasance by the servant do not bind the principal. The refusal of a servant to deliver goods intrusted to him by his employer, on a demand made by a stranger, is not sufficient evidence of a conversion in an action against the servant.[5] Nor is a demand of the servant sufficient to charge the master, unless the former acts under the direction of the latter in refusing to deliver the goods.[6] And it does not seem to alter the case that the master afterwards approves of the conduct of his servant on the ground that he had no authority to deliver the property.[7]

Neither is the principal liable in trespass for the willful act of his servant, as by driving his master's carriage against another, done without the direction or assent of the master,

[1] Coon v. Syracuse and Utica R. R. Co., 1 Selden R., 492; Brown v. Maxwell, 6 Hill R., 592; see Keegan v. The Western R. R, Cor., 4 Selden R., 175.

[2] Woodward v. Washburn, 3 Denio R., 369.

[3] 3 Denio R., 371.

[4] Haywood v. Miller, 3 Hill R., 90.

[5] Mires v. Solebay, 2 Mod. R., 242; Alexander v. Southey, 5 Barn. and Ald. R., 247.

[6] Storm v. Livingston, 6 John R., 44; Pothonier v. Dawson, Holt's N. P. R., 383.

[7] Mount v. Derrick, 5 Hill R., 455.

and in his absense.[1] But he is liable to answer for any damage to another from the negligence or unskillfulness of his servant acting in his employ. The same rule has been applied in the case of a collision of vessels on navigable waters, where it is held that the owner of a steamboat is not responsible in an action on the case, for the willful misconduct of the master in running her against and injuring another boat. This is the plain principle of the common law, and it is altered by our statute only so far as to subject the owner to certain penalties, without at all disturbing the relation between master and servant.[2]

There is indeed no distinction in principle whether the act is done on land or water. To charge the master, it must always be shown or presumed from the circumstances, that the relation of master and servant subsisted between them in the particular affair.[3] If the servant makes a careless mistake, either of omission or commission, the law holds it to be the master's business negligently done; but it does not presume that the servant's willful act of mischief is the act of his principal; nor does it presume that the relation of master and servant extends to that particular act; on the contrary, the presumption of law is that the master did not intend nor assent to an act in itself criminal. He is answerable for his servant's negligence and want of skill, but he is not answerable for his willful injuries.[4]

Under the Code of Louisiana, there are three kinds of free servants recognized: 1. Those who only hire out their services by the day, week, month or year, in consideration of certain wages. 2. Those who engage to serve for a fixed time for a certain consideration, and who are therefore considered not as having hired out, but as having sold their services. 3. Apprentices, that is, those who engage to serve

[1] M'Manus v. Crickett, 1 East R., 106.

[2] Richmond Turnpike Co. v. Vanderbelt, 1 Hill R., 480; 2 R. S., 456, § 16, 2 ed; 1 R. S., 681, 2d ed., tit. 10; Wright v. Wilcox, 19 Wend. R., 343.

[3] Moreton v. Hardern, 6 Dowl. and Ryl. R., 275; Craft v. Alison, 4 Barn. and Ald., 590; Browcher v. Noidstrom, 1 Taunt. R. 568.

[4] Wright v. Wilcox, 19 Wend. R., 343.

any one in order to learn some art, trade or profession.[1] The first of these classes include servants or domestics, who receive wages and stay in the house of the person paying and employing them, for his service or that of his family; such as valets, footmen, cooks, butlers and other house servants.[2] Such servants may leave their employer without assigning any reason, and they may be dismissed in the same arbitrary manner.[3] Other employees are placed upon a different footing, and their relation to their principal is purely one of contract. As with us, masters and employers are answerable for the damage occasioned by their servants and overseers, in the exercise of the functions in which they are employed; but this responsibility only attaches when the master might have prevented the act, causing the damage, and has not done it.

Burden of Proof.

The hirer of chattels for use must, as we have seen, use ordinary diligence in taking care of them. If a hired horse be taken ill, and the hirer calls in a farrier, he is not answerable for any mistakes which the latter may commit in the treatment of the horse; but if instead of that he prescribes himself, and from want of skill gives him a medicine which causes his death, though he act bona fide, the hirer is liable for gross negligence.[4] Where the action is against the hirer for an injury alleged to have been sustained through his negligence, the *onus probandi* is upon the bailor to show that the injury occured through the defendant's neglect.[5]

Where, however, the bailee for hire returns the hired property in a damaged condition, and fails or refuses at the time, or subsequently, to give any account of how the injury occurred, the law will presume negligence on his part, and the burden will be upon him to show a want of negligence.[6]

[1] Code, art. 157.
[2] Code, art. 3172.
[3] Code, art. 2718. Not so as to laborers. Arts. 2719, 2720, 2721.
[4] Dean v. Keate, 3 Campb., 4.
[5] 3 Barb. R., 380; Runyan v. Caldwell, 7 Humph. R., 134.
[6] Logan v. Matthews, 6 Barr. R., 417.

The degree of care demanded by the law varies according to the nature of the property hired, and the circumstances in which it is placed;[1] but it is measured always by that diligence, which, under the circumstances, a man of ordinary prudence and discretion would exercise in reference to the particular thing, were it his own.

Although the owner of a chattel, who has hired it to another, cannot maintain either trespass or trover against a third person, in respect to any injury or conversion of it, during the term for which it is hired,[2] yet, if the bailee do any act inconsistent with the bailment, and calculated to defeat the rights of property in the owner, he may treat the bailment as ended.[3] If the bailee destroy the property, injure it willfully, or sell it, or do any other act that determines his interest in the chattels bailed, the owner may treat the contract of hire as at an end, and recover the value of the chattels, or demand a return of them.[4] But so long as the contract of hire subsists in full force, and the term of the bailment remains yet unexpired, the bailor cannot maintain an action against a third person for a conversion of the property while in the hands of the bailee.[5] The bailee has a remedy in such cases against all persons who disturb him in the possession or enjoyment of his hired property.[6] If he receive it for a specific term, for hire, neither the owner nor his creditor can take it from his custody during the time of the bailment.[7] But if the thing bailed be used in a different manner, or for a different purpose than that agreed upon by the parties, the hirer is answerable for all damages, and even for a loss which due care could not have prevented.[8] In such a case the bailor may consider the contract terminated,

[1] Swigert v. Graham, 7 B. Mon. R., 661.

[2] Clarke v. Poozer, 2 M'Mullan R., 434.

[3] Morse v. Crawford, 17 Verm. R., 499.

[4] Sargent v. Gile, 8 N. Hamp. R., 329; Cothan v. Moore, 1 Ala. R., 423; Campbell v. Stakes, 2 Wend. R., 137; Swift v. Moseley, 10 Verm. R., 208.

[5] Railroad Co. v. Kidd, 7 Dana R., 245; 8 John. R., 432.

[6] Hare v. Fuller, 7 Ala. R., 717.

[7] Hartford v. Jackson, 11 N. Hamp. R., 145.

[8] Wheelock v. Wheelwright, 5 Mass. R., 104; 3 Pick. R., 492; 12 Pick. R., 136.

and bring an action for the value of the property.[1] Proof of such a departure from the terms of the agreement between the parties, is evidence of a conversion.

Where the plaintiff sets forth a special contract of hiring, as that a slave hired should not be employed in and about the water, he must not only show an employment of the slave in and about the water, but that in such employment the injury or destruction of the slave took place. He must support his allegations by proof of the facts alleged.[2]

Where a chattel, such as a slave in one of our southern states, is hired for a specific service, the bailee, as we have said, is responsible for all damages arising from his employment in a different service, and for any loss occurring while the slave is so employed, though by inevitable accident. Evidence that the loss or injury occurred in a service different from that for which he was hired, is sufficient to sustain the action, without showing any want of diligence on the part of the bailee.[3] The person hiring a chattel, assumes the risk of any loss without fault on the part of the owner, to the extent of the price paid for the hire. If the chattel, being a slave, die of an injury previously received, during the term for which he has been hired, the bailee is not relieved from his contract, but must pay the amount of the hire, notwithstanding the death of the slave.[4] But there are, as we shall see, different decisions on this point.

A general bailment of a slave for hire, without any express stipulation or restriction as to the nature or place of employment, does not authorize the hirer to send or carry the slave upon a dangerous sea voyage; and if he does so, and the slave be accidentally drowned in the course of the voyage, he is liable for his value, though no immediate negligence is shown. In such a case, in order to determine the nature and purpose of the bailment, the owner may show that slaves

[1] Rotch v. Hawes, 12 Pick. R., 136.

[2] Huseley v. Branch, 1 Humph. R., 199.

[3] Angus v. Dickerson, 1 Meigs R., 459; 3 Smedes and Marsh R., 129.

[4] Wharton v. Thompson, 9 Yerg. R., 45; 8 Porter R., 33. But see Dugeon v. Teass, 9 Miss. R., 867.

employed in voyages like the one mentioned, command much higher wages than those employed for agricultural purposes, in the place where the bailment is made, and that when engaged for such voyages, there is generally a stipulation to that effect.[1]

The burden of proof rests upon the party alleging a fact, by way of maintaining or defending an action, to establish it by evidence; this is the general rule, and there is no exception in favor of the bailor. If he allege an injury or loss of his property to have occurred through the negligence of the bailee for hire, he is bound to establish the fact by evidence;[2] and his proof must be as broad as the allegation. It is not enough for him to prove a loss; he must also show that it was caused by the negligence of the bailee.[3] The proof need not always be explicit as to the precise cause of loss or injury.[4] In general, though the law does not intend negligence, the bailee is presumed to have acted according to his trust until the contrary is shown.

But where the property is not returned, at the end of the time for which it is hired, all the bailor has to do is to prove the delivery of the property under the contract, and this throws the burden of proof on the bailee to show a loss, as well as the manner in which it occurred.[5] But where the property is returned in an injured state, proof of that fact alone is not sufficient to put the bailee on his defence.[6] No doubt, he is bound to render some account of the manner in which the injury has been received, and if he conceals all knowledge on the subject, and refuses to make any statement whatever in relation to it, the fair presumption is that he is covering up his own wrong; and hence it was held in Logan v. Matthews that under such circumstances the law

[1] Spencer v. Pilcher, 8 Leigh. R., 565.

[2] Newton v. Pope, 1 Cowen R., 109; Millon v. Salisbury, 13 John. R., 211.

[3] Cooper v. Barton, 3 Campb. R., 5; 9 Wend. R., 268; 11 id., 25; 11 Rawle R., 275; 2 Barb. R., 326; 3 id., 380.

[4] 2 Kernan R., 236.

[5] Clarke v. Spence, 10 Watts R., 335; 7 Cowen R., 501; Tompkins v. Saltmarsh, 14 Serg. and Rawle R., 275.

[6] Story on Bailm., § 410.

will presume negligence on his part, and thus call upon him legally for an explanation.[1]

Accession.

The owner of personal property, bailed for hire, cannot always follow and reclaim it, even after the term for which it is hired has expired. A lead mining company, being the owners of certain real estate on which they have buildings and works for the smelting of lead ore, hire a steam engine and boilers, with an agreement to surrender them in as good state and condition as the reasonable use and wear thereof will permit; and immediately affix the same firmly to the freehold, so that they cannot be removed without destroying the building in which they are placed; and thereupon transfer the real estate, including the buildings, to a third person, without notice of the bailor's claim; this, it is held, works an absolute transfer of the property.[2] The purchaser acquires the title to the premises, and no one can disturb him in his possession of them, on the ground that the materials of which the buildings are constructed have been wrongfully taken or converted.

The increase of a flock, hired for a fixed term, belong, as we have seen, to the person who hires them.[3] But where the owner of a mare puts her to pasture, in consideration of her services, the bailee is not entitled to her increase.[4] Where the municipal law establishes the condition of slavery, the issue of slaves born, during the existence of a tenancy for life, belong to the tenant for life.[5] A testator dies, leaving a will containing this clause: "I give and bequeath unto my beloved wife, Elizabeth, one negro woman named Rachel, &c., for and during her natural life, and at her decease to be equally divided between her children which are

[1] 6 Barr. R., 417.

[2] Fryatt v. The Sullivan Company, 5 Hill R., 116, and 7 Hill R., 529.

[3] 8 John. R., 435; Wood v. Ash, Owen R., 138; Bellows v. Denison, 9 N. Hamp. R., 293.

[4] Allen v. Allen, 2 Pennsyl., 166.

[5] Bohn v. Headley, 7 Har. and John. R., 257.

now alive;" under this provision, it is held that Rachel's children, born during the lifetime of the legatee, are the property of her representatives.[1] So where a testator left a will containing this clause: "My will and desire is, that all my negroes shall be free, except my negro woman Nanny; and my will is that she shall serve my mother, Ann Brown, during her life, and at her death my said negro woman Nanny to enjoy her freedom;" it is adjudged that her children, born during this tenancy for life, remain in the condition in which they were born.[2]

Under the Code of Louisiana, the increase of cattle belong to the usufructuary, who acquires under his contract of hire all the profit, utility and advantages to be derived from them, during the term of his usufruct. But the children of slaves, born during the term of the contract, belong to the owner; the usufructuary has only the right to their labor and services.[3] Though the law treats the slave as property, it exacts of one who hires his services an observance of humanity, and that measure of care and attention to his comfort and welfare, that a master, with a humane sense of duty, would feel it incumbent on him to exercise in the treatment of his own slaves.[4] The master, responsible for his conduct, is not answerable for the willful and wanton acts of his slave, except so far as he is made so by statute.[5] So, too, the master is required to take at least ordinary care of his slave; and where a slave was hired to work in gold mines, in which wooden buckets were used for raising up water and ore, in which were valves for letting out the water, and an iron drill was dropped into a bucket, and fell through the valve, and split the skull of the slave, this was adjudged to be a want of ordinary care.[6]

[1] Standiford v. Amoss, 1 Har. and John. R., 526.
[2] Chew v. Gary, 6 Har. and John. R., 526.
[3] Code, art. 536, 537, 539.
[4] Lundsford v. Baynham, 10 Humph. R., 267.
[5] Ewing v. Thompson, 13 Miss. R., 132.
[6] Biles v. Holmes, 11 Ired. R., 16.

Use of the thing hired.

The hirer of chattels for use, as we have stated, is bound to confine himself to the use for which he stipulates. The contract regulates the rights of the parties; if the hiring be general, the hirer has the use of the chattels hired for such purposes as they are fitted by nature, and he is responsible only for ordinary neglect.[1] If the hiring be for a specified time, the hirer acquires an exclusive right to the use of the things hired during the term agreed upon.[2] If, on the contrary, there be no time specified in the contract, and only a general agreement to pay a fixed sum by the year for the use, the bailment may be terminated at the option of the bailor, who may maintain an action against a stranger for any wrongful seizure of the property.[3] The rights of the parties here, are analogous to the case of a gratuitous loan for an indefinite time, where the lender may terminate the loan whenever he pleases, and possession of the borrower is deemed the possession of the lender, so as to enable him to maintain an action against a third person who wrongfully seizes the thing bailed.[4] Where there is the right to terminate the contract at any time, the bailor has the right to resume the property at his election, and he may enforce his right by an action at law.[5]

Sir William Jones thus states the duty of the hirer with regard to the use of the things hired: If Caius, therefore, hire a horse, he is bound to ride it as moderately, and treat it as carefully, as any man of common discretion would ride and treat his own horse; and if through his negligence, as, by leaving the door of his stable open at night, the horse be stolen, he must answer for it; but not if he be robbed of it by a highwayman, unless by his imprudence he gave occasion to the robbery, as, by traveling at unusual hours, or by taking an unusual road; if, indeed, he hire a carriage and

[1] Angus v. Dickerson, 1 Meigs R., 459.
[2] Hartford v. Jackson, 11 N. Hamp. R., 145; 8 John R., 432; 22 Vt. R., 149.
[3] Drake v. Redington, 9 N. Hamp. R., 243.
[4] Orser v. Storms, 9 Cowen R., 687.
[5] 1 Term. R., 180; 8 John R., 432; 9 Cowen R., 690; 9 N. Hamp. R., 243.

any number of horses, and the owner send with them his postillion or coachman, Caius is discharged from all attention to the horses, and remains obliged only to take ordinary care of the glasses and inside of the carriage, while he sits in it.[1]

It has been sometimes said that the hirer of goods is responsible wherever the borrower would be; that he is bound to the utmost diligence, such as the most diligent father of a family uses.[2] But it is now well settled that the rule is not so stringent; that it is enough if he exercise the same degree of diligence which all prudent men, that is, the generality of mankind use, in keeping their own goods.[3] Since the negligence of a servant, acting under his master's directions, express or implied, is the negligence of the master, it follows, that, if the servant of Caius injure or kill the horse by riding it immoderately, or by leaving the stable door open, suffer thieves to steal it, the master must make the owner compensation for the loss; and the rule is the same whether the servant acted by his master's permission or otherwise.[4]

If a chattel be hired for a definite purpose, as a horse to go a certain distance, the hirer must not exceed the terms of the contract.[5] If the thing hired is used for a different purpose from that which was intended by the parties, or in a different manner, or for a longer period, the hirer is not only responsible for all damages, but if a loss afterwards occurs, although by inevitable casualty, he will generally be responsible therefor. There is on the part of the hirer, an implied obligation, not only to use the thing hired with due care and moderation, but also, not to apply it to any other use, nor detain it beyond the time for which it was hired.[6] Accordingly, it is held that where one hires a slave for a

[1] Jones on Bailm., 88, 89.

[2] Coggs v. Bernard, 2 Ld. Raym., 909.

[3] Jones on Bailm., 87, 88.

[4] Sinclair v. Pearson, 7 N. Hamp. R., 219; Jones on Bailm., 89.

[5] Rotch v. Hawes, 12 Pick. R., 136.

[6] Mayor of Columbus v. Howard, 6 Geo. R., 213; 5 Mass. R., 104; 3 Pick. R., 492.

particular service, and afterwards appropriates him to a different service from that contemplated by the contract, and the slave is lost, the hirer is answerable for the loss, though it occur by inevitable accident.[1]

Where there is no agreement as to the manner in which a hired chattel shall be used, the presumption and impled agreement between the parties is, that it shall be used in the ordinary manner,[2] and for the purposes to which it is naturally fitted. Thus, if a horse is hired as a saddle horse, the hirer has no right to use him in a cart, or to carry loads, or as a beast of burden. So, on a contract for the hire of a vehicle, usually employed to carry two persons, both parties being silent as to the number of persons who are to be permitted to ride in it, the hirer is authorized to carry such a number as the carriage was made for.

It is a misuser of hired chattels to appropriate them to a purpose different from that which was intended by the parties, or to use them in a different manner, or to detain them for a longer period than that agreed upon; and such a misuser, at common law, is deemed a conversion of the property,[3] for which the hirer is generally held responsible to the letter to the full extent of his loss. Where one receives goods upon a contract, by which he is to keep them a certain period, and if in that time he pays for them, he is to become the owner, but otherwise is to pay for the use of them; he receives them as a bailee, and the property in them is not changed till the price is paid; and if the bailee in the meantime assume to sell them, the bailment is ended, and the owner may demand and recover the goods.[4]

The hirer of a slave is bound to treat him with humanity, and observe towards him that measure of care and attention which a humane master shows in the treatment of his own slaves;[5] and the law implies an agreement on the part of the

[1] Hooks v. Smith, 18 Ala. R., 338.
[2] Harrington v. Snyder, 3 Barb. R., 380.
[3] 2 Saunders, 47, n. g.; 5 Mass. R., 104; 3 Pick. R., 492; 12 id., 136.
[4] Sargent v. Gile, 8 N. Hamp. R., 325.
[5] 10 Humph. R., 267.

hirer to furnish him with suitable food and clothing.[1] However, a bailee of slaves, who recognizes the title of the owners, two of whom are infants, and acting in good faith, keeps them subject to delivery whenever legally demanded, and who, in consequence of instructions from the guardian of the infants, refuses to deliver them to the other joint owners, without his authority, is not chargeable in equity with what the slaves would have hired for, but only with the actual value of their services, after deducting the expenses of their food and clothing.[2] There is no implied agreement that one who hires a slave, shall pay for medical services and attendance upon him in sickness;[3] such expenses are to be deducted from the hire, as in the case of a horse bailed for hire.[4]

The hirer of chattels may, in some instances, render himself liable, even where he acts in good faith and to the best of his ability; as, where he undertakes to prescribe for a hired horse, taken ill on a journey, and from want of skill gives him a medicine that causes his death; but if he call in a farrier, he is not answerable for results.[5] So, too, the bailee for hire may render himself liable for losses caused by inevitable accident, without any fault on his part immediately connected with the loss. Plaintiff put on board defendant's barge a quantity of lime to be conveyed from the Medway to London; the master of the barge deviated unnecessarily from the usual course, and during the deviation a storm arose and wet the lime, and the barge taking fire thereby, the whole was lost; and it was held that the defendant was liable, and that the cause of the loss was sufficiently proximate to entitle the plaintiff to recover under a declaration alleging the defendant's duty to carry the lime without unnecessary deviation, and averring a loss in consequence of such deviation.[6]

[1] Sims v. King, 18 Ala. R., 236.

[2] Leach v. West, 16 Ala. R., 250.

[3] Isbel v. Norvell, 4 Gratt. R., 176; but see 5 Munroe R., 359; 1 Bibb R., 536; 2 Hen. and Mun. R., 5.

[4] 3 Barb. R., 380.

[5] Dean v. Keete, 3 Campb. R., 4.

[6] Davis v. Garrett, 6 Bing. R., 716. The decision in this case was governed by the law applicable to common carriers.

In the case in which this decision was made, it appeared in evidence that the master of the defendant's barge had deviated from the usual and customary course of the voyage, without any justifiable cause; and that afterwards, and whilst such barge was out of her course, in consequence of stormy and tempestuous weather, the sea communicated with the lime, which thereby became heated, and the barge caught fire, and the master was compelled for the preservation of himself and crew, to run the barge on shore, where both the lime and barge were entirely lost. It was not shown positively that the loss was the consequence of the deviation, nor was it shown that the loss must have happened from the same cause if no deviation had taken place. On the defence it was argued that there was no natural or necessary connection between the wrong of the master, in taking the barge out of its true course, and the loss itself; for that the same loss might have been occasioned by the very same tempest, if the barge had proceeded in her direct course. But the court held that no wrong-doer can be allowed to apportion or qualify his own wrong; and that as a loss had actually happened, attributable to his wrongful act, whilst his wrongful act was in operation and force, he should not be permitted to set up as an answer to the action the bare possibility of a loss, if his wrongful act had never been done.

The same principle was applied in the case of a ship, captured in a deviation from her true course; and it was adjudged that the party in fault could not relieve himself from liability by a suggestion that the same thing might have happened in any event.[1] Nor can the bailee, through whose fault the goods bailed have been injured, show that they must have been destroyed by a subsequent and inevitable accident.[2] Sir William Jones expresses the opinion that if the bailee, to use the Roman expression, be in *morâ*, that is, if a legal demand have been made by the bailor, he must answer for any casualty that happens after the demand; unless in

[1] Parker v. James, 4 Campb. R., 112.
[2] Powers v. Mitchell, 3 Hill R., 545.

cases where it may be strongly presumed that the same accident would have befallen the thing bailed, even if it had been restored at the proper time.[1] But a refusal to deliver on demand, after the contract of bailment has expired, renders the bailee liable as for a conversion of the property; and the case of Powers v. Mitchell shows that, after he has once rendered himself answerable for an injury, he cannot relieve himself by showing that the goods were, in fact, and must have been destroyed by a future and inevitable accident.[2]

Though the bailee be in fault, as, for improperly stowing goods on the deck of a vessel, the bailee is not liable where they are lost by such an inevitable accident as would have destroyed them even if they had been properly stowed under the deck; for in this case his fault does not cause the loss.[3] To render the bailee responsible for the injury or destruction of the goods, his negligent act or deviation from the contract must be the immediate, or to use the legal phrase, the proximate cause of the injury or loss.[4] Unless his negligence can be regarded as the producing cause of the loss, he is not responsible to make it good. Where, however, he has been previously guilty of an act of conversion, the rule becomes more stringent and he is answerable for all casualties.[5]

Termination of the Contract.

The contract of hire for use is terminated when it has been fully performed, and in various ways which interrupt its continuance and prevent its execution. When the time of the bailment has expired, or its object has been accomplished, it is the duty of the bailee to redeliver the articles bailed to the owner. Where the owner of goods on board

[1] Jones on Bailm., 70.

[2] 3 Hill R., 545; 6 Bing. R., 716; Bell v. Reed, 4 Bin. R., 127; 4 Campb., R., 112; Story on Bailm., § 113.

[3] Crane v. The Rebecca, 6 Amer. Jurist., 1, 15.

[4] Hastings v. Pepper, 11 Pick. R., 41–44; 4 Bin. R., 127; 7 Adolph. and Ellis R., 40; The Paragon, Ware, Rep., 322, 324.

[5] Wheelock v. Wheelwright, 5 Mass. R., 104; 3 Pick. R., 492; 12 id., 136; 3 Hill R., 545.

a vessel directed the captain not to land them on the wharf, against which the vessel was moored, which he promised not to do, but afterwards delivered them to the wharfinger for the owner's use, it was held that he was liable after a demand and refusal, unless he could show that the wharfinger had a lien on them.[1] If, by a mistake, he delivers the property to the wrong person, he is responsible therefor; for that is regarded as a conversion.[2] A demand of payment or satisfaction generally, for the goods, is a sufficient demand; and, it seems, where the defendant admits that he had the plaintiff's goods and that they are lost, this is sufficient evidence of a conversion, without showing a demand and refusal.[3] But an accidental loss, without fault in the bailee, is not a conversion. The hirer is bound to restore the things bailed, being answerable only for such injuries as are attributable to his want of ordinary care and diligence in the use of them.[4] Injuries received in any other manner, by accident or by casualties incident to the things bailed, are to be borne by the bailor.

Where the bailee has been guilty of an act of conversion, a redelivery of the articles bailed will not protect him from an action for the damages sustained by his misuse of the property while in his custody.[5] The acceptance of the property, on its return in a damaged condition, is not a waiver of the bailor's right of action for the damages.[6] The acceptance or repossession of the goods does not bar the action, but it may be given in evidence in mitigation of the damages.[7] The action for damages can only be barred by a release, or the acceptance of something in satisfaction for the

[1] Seyds v. Hay, 4 Term R., 260.

[2] Youl v. Harbottle, Peake R., 49; Stephenson v. Hart, 4 Bing. R., 476; Stephens v. Elwall, 4 Maule and Selw., 259; 2 Barn. and Ald., 702; Willard v. Bridge, 4 Barb. R., 361; Clarke v. Spence, 10 Watts R., 335; 5 Rawle R., 179; Lubbock v. Inglis, 1 Stark. R., 83; Seyds v. Hay, 4 Term R., 260.

[3] La Place v. Aupoix, 1 John. Cas., 407; 4 Phil. Ev., Cow. and Hill's ed., 225.

[4] Millon v. Salisbury, 13 John. R., 211; Cooper v. Barton, 3 Camp. R., 5, n.

[5] Reynolds v. Shuler, 5 Cowen R., 323.

[6] Murray v. Burling, 10 John. R., 172; 5 Cowen R., 326; Baylies v. Fisher, 7 Bing. R., 153; Gibbs v. Chase, 10 Mass. R., 125; 5 Mass. R., 104.

[7] Bowman v. Teall, 23 Wend. R., 306.

demand.[1] A right of action once vested, says Mr. Justice Bosanquet, can only be destroyed by a release under seal, or by the receipt of something in satisfaction for the wrong done.

In respect to the mode in which the thing bailed is to be returned, it is to be observed that nearly the same rules apply as in other kinds of bailment. Where the hiring is for a specific time, or for a special purpose, the chattels bailed must be returned as soon as the time has expired, or the purpose has been fulfilled; and there is an implied agreement, on the part of the bailee for hire, to restore the chattels at the time and place, which the circumstances themselves point out for their return. Ordinarily the goods are to be returned to the place from which they are taken.[2] But the place where they are to be restored, is always determined with reference to the nature of the thing to be redelivered, and the relative situation and circumstances of the parties to the contract of the bailment.[3] The hirer, being bound to return the things bailed within a given time, or immediately after the purpose for which he hired them has been answered, stands in a relation to the bailor, analogous to that of a debtor to his creditor; and where no place for the return has been agreed upon, he, it seems, being under an obligation to restore them, is bound to seek the bailor and ascertain where he will receive the goods.[4] Where rent is payable in kind by the terms of a lease at such a place in a market as the lessor may appoint, if no appointment is made, it is the duty of the lessee to seek the lessor to acertain the place of payment and there to deliver his rent; he owes an active duty; and so also does the bailee for hire, who either expressly or impliedly undertakes to return the goods.[5]

[1] Baylis v. Usher, 4 Moore and Payne R., 790; Willoughby v. Backhouse, 4 Dowl. and Ryl. 539; 2 Barn. and Cres., 821.

[2] 2 Kent's Comm., 508; Scott v. Crane, Conn. R., 255; 5 id., 76; Mason v. Briggs, 16 Mass. R., 453.

[3] Slingerland v. Morse, 8 John. R., 474; Coit v. Houston, 3 John. Cas., 243; Barns v. Graham, 4 Cowen R., 452; Lobdel v. Hopkins, 5 Cowen R., 516; Sheldon v. Skinner, 4 Wend. R., 525; Lush v. Druse, 4 id., 313 and 377; 5 Wend. R., 187.

[4] Sheldon v. Skinner, 4 Wend. R., 525; id., 313.

[5] Lush v. Druse, 4 Wend. R., 313.

Where a party received from another a number of hogs to fatten on shares, and when they were fattened gave notice to the owner and required him to attend to the division of the hogs within three or four days and take away his share, and on the owner's refusing to attend for that purpose, made a division himself and turned the owner's share loose into the street, it was held that the party was guilty of a violation of duty in turning the hogs into the street; that he was liable for the damages;[1] and that he should have made a tender of the share belonging to the owner at the owner's yard, that being the place where he received them. The time of the delivery here was not fixed, nor was the place appointed otherwise than by the understanding implied by law.

Under an agreement by a bailee to deliver goods on demand, the demand may be made at any place, but it is sufficient if the bailee offer to deliver at the place where the property is, or at his dwelling-house or place of business.[2] But where he is bound generally to return the goods on a day named, or within a given time, he must seek out the person to whom they are to be delivered, and ascertain where he will receive them.[3] A tender of the articles at the time and place required by the contract, provided they be properly designated and set apart, as it will discharge the debtor, is, without doubt, enough to acquit the bailee of his responsibility for the return of the goods.[4]

It is proper to mention that the distinction taken in regard to loans, between an obligation to restore specific things, and a power or necessity of returning others equal in value, holds good likewise in contracts of hiring and depositing; in the first case, it is a regular bailment; in the second, it becomes a debt. If an ingot of silver be delivered to a silversmith to make an urn, the property being transferred, the employer is only a creditor of metal equally valuable

[1] 4 Wend. R., 525.

[2] Lobdel v. Hopkins, 5 Cowen R., 514.

[3] Scott v. Crane, 1 Conn. R., 255; 5 id., 76; 16 Mass. R., 453; 8 John. R., 474.

[4] Smith v. Loomis, 7 Conn. R., 110; Robinson v. Batchelder, 4 N. Hamp. R., 46.

which the workman engages to pay in a certain shape; the smith may accordingly use it as his own, and if it perish even by unavoidable mischance or irresistible violence, he must abide the loss; for it is his own property.[1] The rule is different, where the same silver is agreed to be redelivered in the form of a cup or urn.[2] Whenever the same thing is to be specifically redelivered in another form, since the contract remains a bailment, the redelivery is to be made in the manner specified or implied in the terms of the agreement; as where wheat is delivered, to be manufactured and returned in the shape of flour.[3]

The obligation of the hirer to pay the price of the hire, is a part of his contract, to be performed like any other stipulation; and from which he may be released on the same terms as from any other valid agreement, by a total failure of the consideration or by any other fact which defeats his use and enjoyment of the things hired.[4] In some cases, where there has been a partial use of the things bailed and then a total loss of them without fault on the part of the bailee, a compensation is allowed *pro tanto*.[5]

The contract of bailment for hire is terminated by the expiration of the time, or the accomplishment of the purpose for which the thing bailed is hired. The bailee cannot retain the property beyond the time agreed upon, without rendering himself liable for all casualties;[6] nor after the purpose for which it was hired has been accomplished, without being answerable for all damages.[7]

The contract is also terminated by the loss or destruction of the thing bailed. The contract, being connected with the custody of the chattels delivered in bailment, cannot

[1] Jones on Bailm., 102.

[2] Hurd v. West, 7 Cowen R., 752.

[3] Norton v. Woodruff, 2 Com. R., 153.

[4] Story on Bailm., § 417; Cutler v. Powell, 6 Term, R., 320; Appleby v. Dodd, 8 East R., 300.

[5] Young v. Bruces, 5 Litt. R., 324; Collins v. Woodruff, 4 Eng. R., 463, Ark.,

[6] Wheelock v. Wheelwright, 5 Mass. R., 104; Homer v. Thwing, 3 Pick. R., 492.

[7] Rotch v. Hawes, 12 Pick. R., 136; Schenck v. Strong, 1 South., 87.

continue in force after the subject matter out of which it arises has ceased to exist. Hence, where a slave hired for a year, dies during the year, the contract is ended and the owner recovers the hire only up to the time of his death.[1] Nor is the rule different where a person hires a slave for a year, and agrees to return him at the end of the year; his death without any fault on the part of the bailee, during the term, discharges him from his agreement to restore the property.[2] Such an agreement is not regarded as an undertaking to insure the life of the slave, and it would, as the court intimate in Harris v. Nichols, be indecent to suppose that the parties intended to stipulate, in the case of death, for a return of the dead body.[3] Though the contract is terminated by the loss or destruction of the property, the liabilities previously incurred remain undischarged.[4]

Questions have frequently arisen in our southern states under contracts for the hire of slaves, but the decisions thereon are not very uniform. In George v. Elliot, the complainant asked for relief in equity against a judgment on a bond for twenty pounds, stating that the bond had been given for the hire of a slave for one year; that the slave became sick immadiately after the term commenced and died in the middle of the term. And the court say: "The only question in this case, is, whether the plaintiff should be allowed a credit upon his bond, from the time of the negro's death to the end of the year, for so much as the hire for that time would amount to. The court understand the rule to be, where one hires a slave for a year, that if the slave be sick, or run away, the tenant must pay the hire; but if the slave die, without any fault in the tenant, the owner and not the tenant should lose the hire from the death of the slave, unless otherwise agreed upon. By pursuing this rule the act of God falls on the owner, on whom it must have fallen if the slave had not been hired; from which time it

[1] 4 Eng. R. (Arkansas), 463.

[2] Young v. Bruces, 5 Litt. R. (Ken.), 324.

[3] 5 Mun. R., 483; this decision was made in the Court of Appeals in Virginia.

[4] 5 Munroe R., 358.

would be unreasonable to allow the owner hire. Hire! for what? for a dead negro!"[1]

Notwithstanding the point of exclamation with which this decision, made half a century since, is concluded, the principle thus laid down has not passed unquestioned. The same question is decided differently in Harrison v. Murrell.[2] The case came up in Kentucky on an application for relief in equity: a recovery at law had been had on a covenant to pay one hundred and sixty dollars for the hire of two negroes for the term of one year, payable on a given day; one of the negroes had died within a month after the year commenced; and it was held in equity that the hirer was not entitled to an abatement of the price on account of the death of the slave after the term commenced. The decision is based upon the analogy the case is supposed to bear to that of a tenant who hires real estate for a term, and is held liable for the rent, notwithstanding the buildings thereon, which alone render it valuable, are destroyed by fire;[3] and the court go so far as to hold that the bailee is bound to employ a physician and pay him for his attendance upon the slave in sickness, without being entitled to any abatement from the price of the hire, either for the loss of services or for the physician's bill.[4]

The analogy relied upon in this case is not perfect; for the tenant who rents a house or other tenement, even for a short period, and with a view to no other benefit except that which may be derived from its actual use, does acquire a perfect right over the real estate so hired for his entire term; the consideration for his covenant to pay rent is modified by such a casualty as fire, but it is not wholly destroyed, as it is in the case of the death of a slave hired for the term of a year. But even the rule which requires the tenant of a

[1] 2 Hen. and Mun., R., 5.

[2] 5 Munroe R., 359.

[3] Gates v. Green, 4 Paige R., 355; Hollzopffell v. Baker, 18 Ves. R., 415; 4 Taunt. R., 45.

[4] Redding v. Hall, 1 Bibb R., 536. A covenant to pay absolutely a certain sum of money, is not rendered void by a partial failure of the consideration.

building hired for a short term, to pay rent for the building after it has been destroyed by fire, is not founded in principles of natural equity, and it was aodpted with great reluctance into the equity branch of the common law.[1] By the law of Scotland and under the Code Napoleon, in the case of a loss or injury to the hired tenement, not caused by the fault or negligence of the tenant, he is entitled to an abatement of the rent proportioned to the injury; or if the building be totally destroyed the lease itself may be rescinded.[2]

The contract of bailment for hire, is no doubt terminated by any event which totally destroys the chattel bailed, without any fault on the part of the bailee; if destroyed by his fault he is answerable for the damages, and probably also for the hire of the chattel during his term.[3] So, also, the contract is ended, if during the bailment the bailee become the purchaser of the things bailed;[4] but it will not be affected by a sale made by the bailor of his reversionary interest to a third person, for the reason that he can convey no greater interest than he possesses, and has not during the bailment a present right of possession.

HIRE OF LABOR AND SERVICES.

In a general sense the hire of labor and services is the essence of every species of bailment, in which a compensation is to be paid, for care and attention or labor bestowed upon the things bailed. The hire of custody, where goods are deposited for safe keeping; the contract of wharfingers, carriers, forwarding and commission merchants, factors and other agents, who receive goods to deliver, carry, keep, forward or sell, are all of this nature, and involve a hiring of services.[5] The subject is usually divided into two branches;

[1] Brown v. Quilter, Amb., 619; Steel v. Wright, 1 Term R., 708; 4 Paige R., 355.

[2] Per Chancellor Walworth, in Gates v. Green, quoted above.

[3] 2 Hen. and Mun. R., 5; Story on Bailm., § 418.

[4] 5 Hill R., 116; Sargent v. Gile, 8 N. Hamp. R., 325.

[5] Jones on Bailm., 97; Story on Bailm., § 421, 422

first, *locatio operis faciendi*, being the usual contract for labor and services to be bestowed upon the thing bailed; and, second, *locatio operis mercium vehendarum*, which is a contract relating to the carriage of goods for hire. This second branch embraces the duties of common carriers, and requires to be considered by itself.

Where cloth is delivered to a tailor to be made up into a suit of clothes, the contract is for the labor and services of the tailor; this is the object of the bailment, known as *locatio operis faciendi;* but it is not the whole of his undertaking; he is not only obliged to perform his work in a workmanlike manner, but since he is entitled to a reward, either by express bargain or by implication, he must also take ordinary care of the thing bailed to him.[1] So, a jeweler who receives a gem to be set or engraved, and a watchmaker with whom a watch is left for repairs, are bound to perform the work skillfully, and keep the articles intrusted to them, with that care and diligence which every man of common prudence and capable of governing a family takes of his own property of a like kind.[2]

The contract is the same wherever materials are delivered to a workman or mechanic to be manufactured or made up for the owner, in the course of his business or trade. Receiving them on a contract for hire, he is answerable for losses occasioned by the ordinary neglect of himself or his servants; that is to say, he is obliged to keep them with ordinary diligence.[3] Where the same thing is not to be returned in its new or manufactured condition, as where silver is delivered to a silversmith on an agreement that he shall return therefor silver plate of equal value, the contract is one of sale and not of bailment; for in this case the title passes.[4] This is material to consider, on account of the different liabilities which arise out of the transaction in the

[1] Jones on Bailm., 90, 92.

[2] 2 Kent's Comm., 588; Clark v. Earnshaw, 1 Gow. N. P. C., 30.

[3] Jones on Bailm., 91, 92.

[4] Jones on Bailm., 102; 2 Kent's Comm., 589; Norton v. Woodruff, 2 Comst. R., 153.

case of a loss of the property, without any neglect which would render a bailee for hire responsible for its value. Whether or not the title passes, depends upon the terms of the contract. If the product of the identical thing delivered is to be returned in its manufactured condition, it is a bailment, though it be changed in the manufacturing process into an entirely new and different article; as where corn is delivered to be manufactured into whiskey.[1] It does not matter how perfect the transmutation may be, so long as the material can be traced and the product identified with it.[2]

Bailor's right of Property.

Where a manufacturer or mechanic agrees to construct a particular article out of his own materials, or out of materials, the principal part of which are his own, the property of the article, until its completion and delivery, is in him and not in the person for whom it is made. Thus, where a contractor agrees to build a vessel and furnish the timber requisite to complete its frame-work, and the person for whom it is built stipulates to advance money thereon from time to time as the work progresses, and also to furnish the materials for the joiner's work, it is adjudged that the property in the vessel remains in the contractor until it is completed and delivered.[3] The party furnishing the principal part of the materials, under such a contract, is the owner of the vessel during the progress of the work. When the materials of another are united to materials of mine, by my labor, or by the labor of another, and mine are the principal materials, and those of the other only accessory, I acquire the right of property in the whole, by right of accession. This is considered as a general principle in the acquisition of property.[4]

The owner of a quantity of black salts, delivers them to a manufacturer, on an agreement that he will work them into pearlashes, and redeliver them to the owner in casks ready

[1] Smith v. James, 7 Cowen R., 328.
[2] Pierce v. Schenck, 3 Hill R., 28.
[3] Merritt v. Johnson, 7 John. R., 473.
[4] 7 John. R., 475, and the authorities there cited.

for market at the manufactory; the salts are kept separate from others, and the substance or chemical properties of the alkali are not materially changed in the process of manufacturing them into pearlashes; when the work is finished the casks are rolled into the highway, separated and covered as the property of the person furnishing the salts; the title in this case is not changed, and the delivery into the street is tantamount to a delivery to the owner.[1]

Where one party takes raw materials belonging to another to work up into manufactured articles on shares, and agrees to give the owner security for his share, payable at a future day, and before doing so disposes of the property, the owner may maintain an action in the nature of trover for his share of the property, and he is not limited to an action in the nature of assumpsit on the contract. Though there be a stipulated price to be paid for the materials, the title to them does not pass until security is in fact given.[2] So, where goods are ordered to be made, while they are in progress, the materials belong to the maker. The property does not vest in the party who gives the order until the thing ordered is completed. And although while the goods are in progress of being made, the maker may intend them for the person ordering, still he may afterwards deliver them to another and thereby vest the property in the party so receiving them.[3] In order to pass the title there must be a contract to that effect, and where there is a condition precedent to be performed, it must be shown to have been complied with.

In cases where the question is, whether a delivery of property amounts to a sale or a bailment, the distinction between them, which is found to run through the authorities on the subject, is this:[4] Where the identical thing delivered, though in an altered form, is to be restored, the contract is one of bailment and the title to the property is not changed.

[1] Babcock v. Gill, 10 John. R., 287.

[2] Rightmyer v. Raymond, 12 Wend. R., 51.

[3] Atkinson v. Bell, 8 Barn. and Cres. R., 277.

[4] Mallory v. White, 4 Comst. R., 85; Foster v. Pettibone, 3 Selden R., 433; Hurd v. West, 7 Cowen R., 752.

But when there is no obligation to restore the specific article, and the receiver is at liberty to restore another thing of equal value, he becomes a debtor to make the return, and the title to the property is changed; it is a sale.

This principle is well established and easily stated, but its application is often rendered difficult by the qualifying circumstances attending the transaction.[1] A delivery of wheat at a flouring mill to be manufactured into flour, on an agreement that for every four bushels and fifteen pounds of wheat the receiver is to deliver one hundred and ninety-six pounds of superfine flour, packed in barrels, to be furnished by the owner of the wheat, and also the offals or feed, and to receive therefor sixteen cents per barrel, constitutes a bailment; but there are dissenting opinions on the case, based on the ground that the receiver here is not required to return the same wheat he received in the shape of flour.[2] On the other hand, a delivery of wheat at a flouring mill, on an agreement by the miller that for every four bushels and fifty-five pounds of wheat received, he will deliver to the owner of the wheat one barrel of superfine flour, warranted to bear inspection, amounts to an exchange or sale of the wheat for a price to be paid in flour.[3] In this case the wheat was received by the miller and placed in a common bin with other wheat, purchased by him on his own account, and there was no agreement that the wheat delivered should be kept separate from other grain, or that this identical wheat should be returned in the form of flour. The same rule is held where the agreement is to *take* wheat and *give* therefor flour, at the rate of one barrel for every four bushels and thirty-six pounds of wheat, the wheat being received and mixed with other wheat, and there being nothing in the contract to require the person receiving it to return, or give in exchange flour manufactured from the same wheat.[4]

[1] 4 Comst. R., 76.
[2] Mallory v. Willis, 4 Comst. R., 85, 91.
[3] Smith v. Clark, 21 Wend. R., 83.
[4] 2 Comst. R., 153; Ewing v. French, 1 Blackford's (Ind.) R., 353.

So where the owner of a quantity of cotton yarn delivers it to a manufacturer at the price of sixty-five cents per pound, to be paid for in plaids at fifteen cents per yard, the receiver to use the cotton yarn in making the warp of the plaids, and to use for filling other yarn of as good a quality, it is held that the title passes; that the transaction amounts to a sale of the yarn at a specified price, to be paid for in plaids at a specified price.[1] This case lies hard by the line which separates a sale from a bailment; for it is conceded by the distinguished judge who delivered the opinion in the case, that the title would not have passed if the delivery had been on an agreement that the receiver should find the filling and manufacture the yarn into plaids on their joint account, the cloth to be divided according to their respective interests in the materials.[2] It does not appear whether the warp or the filling constituted the principal part of the materials to be used in the manufacture; but it is probable that the cost of the labor and services of making the plaids, added to the value of the yarn to be furnished by the manufacturer, considerably exceeded the value of the cotton yarn delivered to be used for the warp. There was here, besides, an absolute agreement for the delivery of the plaids, dependant upon no contingency; and hence the manufacturer was held responsible for the delivery of the plaids, notwithstanding the loss of the yarn by fire.

If a contract be made with a manufacturer to deliver to him raw materials to be returned manufactured, the contract is one of bailment and not of sale, and the title to the article when manufactured remains in the original owner. But if the contract simply requires the return of a manufactured article of equal value, it is a sale, and the title to the material is changed, and the manufacturer becomes a debtor to the person delivering it for the return of the manufactured article.[3] If there be a written contract, the intention of the parties is to be gathered from the terms

[1] Buffum v. Merry, 3 Mason R., 478.

[2] Story on Bailm., § 439.

[3] Foster v. Pettibone, 3 Selden R., 433.

used; but if there be only a verbal agreement accompanying the delivery, their intention is to be inferred in part from the circumstances attending the delivery.

We have said that a ship-builder who agrees to furnish the frame-work and build a vessel for another, retains the title until the vessel is completed and delivered.[1] The doctrine held by the English courts is supposed to involve a slight modification of this rule, though it is in substance the same. A ship-builder contracts to build and complete a ship for his employer, who agrees to pay for her in four installments as the work progresses; the first when the keel is laid, the second when at the light plank, and the third and fourth when the ship is launched; before the third installment is paid, the ship is measured with the builder's consent with a view to get her registered in the name of the employer, and thereupon the builder signs the usual certificate of her building; the third installment is paid, and the ship is registered in the name of the employer, on his oath that he is the owner; directly after, the builder commits an act of bankruptcy upon which a commission is subsequently issued and his property conveyed to assignees; two days after, and before the ship is either completed or launched, the employer, with a crew hired by him, takes possession of her and a rudder and cordage made and purchased by the builder for the express purpose of completing the ship; and it is adjudged that the legal effect of the ship-builder's having signed the certificate to enable the employer to have the ship registered in his name, is to vest in him the general property in the ship from the date of the registry; that the rudder and cordage, made and bought by the builder specifically for the purpose of completing the ship, became part of it and vested in the employer; and, finally, that the builder had not so parted with the possession as to defeat his lien for the fourth installment.[2] The opinion delivered distinguishes this case from that of Mucklow v. Mangles, where the advances were not regulated by the progress of the

[1] Merritt v. Johnson, 7 John R., 473.

[2] Woods v. Russell, 5 Barn. and Ald. R., 942.

work, and the builder was at liberty to deliver any barge answering the requirements of the contract;[1] and argues that the signing of the certificate of building was a delivery—an act designed to pass the property, so as to enable the employer to swear the title to be in himself; but that it was not such a delivery as to defeat the lien of the builder for the balance due him on the contract.

If a person contracts with another for a chattel which is not in existence at the time of the contract, though he pays him the whole value in advance, and the other proceeds to execute the order, the buyer acquires no property in the chattel till it is finished and delivered to him. This is the original doctrine of the common law.[2] The case of Mucklow v. Mangles, presented this state of facts: Royland, who was a barge-builder, had undertaken to build the barge in question for Pocock; before the work was begun Pocock advanced to Royland some money on account, and as it proceeded he paid him more, to the amount of one hundred and ninety pounds in all, being the whole value of the barge; when it was nearly finished Pocock's name was painted on the stern; Royland became a bankrupt, and two days after the barge was completed, and before a commission of bankruptcy had issued, defendant took it on an execution against Royland, and afterwards on receiving an indemnity from Pocock delivered it up to him; and a verdict was rendered for plaintiffs, who sued as the assignees of the bankrupt Royland. Lord Chief Justice Mansfield: "The only effect of the payment is, that the bankrupt was under a contract to finish the barge; that is quite a different thing from a contract of sale; and until the barge was finished, we cannot say it was so far Pocock's property that he could have taken

[1] 1 Taunt. R., 318. In this state a contract for the building of a vessel or other thing not yet *in esse*, does not vest any property in the party for whom it is agreed to be constructed during the progress of the work, nor until it is finished and delivered, or at least ready for delivery, and approved by such party; Andrews v. Durant, 1 Kernan R., 55, and cases there cited.

[2] Mucklow v. Mangles, 1 Taunt. R., 318; Hinde v. Whitehouse, 7 East R., 559. This case shows what circumstances will operate to pass the title on a sale by an auctioneer.

it away. It was not finished at the time when Royland committed the act of bankruptcy; it was finished only two days before the execution." Mr. Justice Heath, in delivering his opinion in the case, says: This is the species of contract which in the civil law is described by the term *do ut facias*. It comes within the cases which have been held to be executory contracts, and as such not within the statute of frauds, as contracts for the sale of goods. A tradesman often furnishes articles which he is making in pursuance of an order given by one person, and sells them to another. If the first customer has other goods made for him within the stipulated time, he has no right to complain; he could not bring trover against the purchaser for the goods sold. The painting of the name on the stern in this case makes no difference. If the thing be in existence at the time of the order, the property in it passes by the contract, but not so where the subject is to be made.[1]

This decision, which is in harmony with the law as held in this state, is, perhaps, partially modified by the subsequent cases decided in the English courts.[2] In Carruthers v. Payne, a chariot was built to plaintiff's order and paid for by him; when finished in other respects, plaintiff ordered a front seat to be added, but the builder being slow in making this addition, plaintiff sent for the chariot repeatedly, and the builder promised to deliver it. Plaintiff being afterwards dissatisfied, ordered the chariot to be sold; and while it was, according to the custom of the trade, standing in the builder's warehouse for that purpose, the front seat not having been added, the builder became bankrupt, and his assignee seized the chariot; more than three months afterwards, plaintiff commenced this action; and it was held, first, that the plaintiff had sufficient property to maintain trover for the chariot; and secondly, that it did not pass to the assignee as a part of the bankrupt's assigned property.[3] Chief Justice

[1] 1 Taunt. R., 318.

[2] Woods v. Russell, 5 Barn. and Ald. R., 942; Carruthers v. Payne, 5 Bing. R., 277; 7 John. R., 473,

[3] 5 Bing. R., 277; see 1 Kernan R., 35.

Best, in the opinion delivered by him, says: If a case, precisely the same as Mucklow v. Mangles, were to occur again, it might require further consideration; and Mr. Justice Park adds: I do not say that I should agree with the decision in Mucklow v. Mangles, if the case were to occur again.

It is to be observed, however, that the case in which these observations were made, did not involve precisely the same question as that presented in the case here criticised; and in Woods v. Russell, the person for whom the ship was built was not only permitted to register it in his name as his own property, but it was actually built under a superintendent appointed by him;[1] and he did, also, with the consent of the builder, exercise other acts of ownership over the ship; such as might authorize a jury to find the fact of a delivery for the purpose of passing the title, though they might not be sufficient to show such a delivery as would defeat the builder's lien.

Upon the completion of a sale of a thing in actual existence, the title passes, though there be only a partial or symbolical delivery of the thing sold; as where a quantity of sugars, stored in the king's warehouse, on which the duties have not yet been paid, are sold at auction by samples, the duties to be paid by the seller, a memorandum of the sale is made, and the samples, with a description of the goods, are delivered to the purchaser, the goods themselves being under the king's key. The vendee, in this case, must bear the loss of the goods by fire, notwithstanding the vendor has been prevented by circumstances from paying the duties thereon.[2]

Not so where there is simply a contract for work and labor in making ordered goods.[3] And because there is no present sale, sufficient to pass the title, under such a contract, it is not within the statute of frauds, which enacts that every contract for the sale of goods, chattels or things in action, for the price of fifty dollars or more, shall be void,

[1] 5 Barn. and Ald. R., 945.

[2] Hinde v. Whitehouse, 7 East R., 559.

[3] Sewall v. Fitch, 8 Cowen R., 215; Downs v. Ross, 23 Wend. R., 271.

unless, 1. A note or memorandum of such contract be made in writing, and subscribed by the parties to be charged thereby: or unless the buyer shall accept and receive some part of such goods, or the evidences, or some of them, of such things in action: or unless the buyer shall, at the time, pay some part of the purchase money.[1]

It is not enough to take a contract for goods out of the statute, that some work and services may be required to put the thing contracted to be sold in proper condition for delivery. A contract for the sale of wheat that requires still to be thrashed, is within the statute; and so is a contract for flour not yet ground; for in both of these cases the contract is for the sale of goods, the seller undertaking to put them into that condition in which he contracts to sell them.[2] But where a thing not in existence is ordered, that must be constructed or manufactured, the agreement is not within the statute and need not be in writing; as where oak pins, a chariot, a wagon, a buggy, or a quantity of nails which are not yet made, are ordered, and must be built or manufactured before they can be delivered, or even regarded as sold.[3] In such cases no title passes until the thing ordered has been completed and delivered to the person ordering it, or until it has been accepted by him; and for this reason the contract is not within the statute of frauds. It was at one time held that the statute does not apply at all to executory contracts, but that doctrine has been long since exploded;[4] though the title of property may not pass under such a contract, it is nevertheless a contract for the sale of goods or chattels; as where a sale of a quantity of cotton is made, to be delivered on its arrival.[5]

[1] 2 R. S., 195, 3d ed.

[2] Garbutt v. Watson, 1 Dowl. and Ryl., 219; 5 Barn. and Ald. R., 613; 23 Wend. R., 271; Clayton v. Andrews, 4 Burr., 2101.

[3] Towers v. Osborne, 2 Strange R., 506; Groves v. Buck, 3 Maule. and Selw. R., 178; Crookshank v. Burrell, 18 John R., 58; Mixer v. Howarth, 21 Pick R., 205; 8 Cowen R., 215.

[4] Rondeau v. Wyatt, 2 H. Black, 63; Cooper v. Elston, 7 Term. R., 14; Bennett v. Hull, 10 John R., 364; Jackson v. Covert, 5 Wend. R., 139.

[5] Russell v. Nicol, 3 Wend. R., 112. It was said at Westminster Hall more than eighty years ago, that the statute of frauds had not been *explained* at a less

It is not easy to draw the line clearly; so as to discriminate at a glance those cases which are within the statute from those which are not. In Smith v. Surman, the defendant agreed to purchase a quantity of timber of the plaintiff, and the contract was held within the statute, although a part of the trees were standing at the time of the bargain and were afterwards to be cut by the vendor. Mr. Justice Bayley denied that it was a mixed contract for goods and chattels and for work and labor to be bestowed and performed by the vendor for the vendee, asserting that it was a contract for the future sale of the timber when it should be in a fit state for delivery; and that the vendor, in felling the timber and preparing it for delivery, was doing work for himself, and not for the vendee. And Mr. Justice Littledale, in the same case, says that as a contract for mere work and labor is not expressly mentioned, it may not therefore be within the statute; but where the contracting parties contemplate a sale of goods, although the subject matter at the time of making the contract, may not exist as goods, but is to be wrought into that state by the vendor's bestowing work and labor upon his raw materials, that is a case within the statute.[1]

This language is a little too general; for it is certain that a contract to make and deliver a thing not then existing, and yet to be made, such as the wood work of a wagon, is not within the statute. Though it is to be made out of materials furnished by the contractor, it is a contract for work and labor, and not for the sale and purchase of goods.[2] So, also, in Towers v. Osborne, where the defendant bespoke a chariot, and after it was made for him, refused to take it, Pratt, Ch. J., ruled that it was not a case within the statute.

expense than one hundred pounds sterling; Chancellor Kent at the time he wrote his commentaries, thought the sum might be put down at a million and upwards; Mr. Justice Bronson, in Downs v. Ross, says, these are both very safe estimates, and still the statute is not yet "explained"; and it never will be, so long as it is held that a promise by the seller to thrash his grain and blow the chaff out of a bin of wheat before sending it to market, changes the contract of sale into an agreement for work and labor. 23 Wend. R., 272.

[1] Smith v. Surman, 4 Man. and Ryl. R., 455; 9 Barn. and Cress. R., 561.

[2] Crookshank v. Burrell, 18 John. R., 58.

The distinction taken by Lord Loughborough in Rondeau v. Wyatt, and by the judges who gave opinions *seriatim*, in Cooper v. Elston, was between a contract for a thing existing *in solido*, and an agreement for a thing not yet made, to be delivered at a future day. The contract, in the latter case, they considered not to be a contract for the sale and purchase of goods, but a contract for work and labor merely.[1] However refined this distinction may be, it is well established by authorities and may be considered as settled law.

No doubt the terms of the contract may be such as to bring an agreement for goods within the statute, though not actually in existence at the time it is made. In Watts v. Friend, the declaration stated that in consideration that the plaintiff would supply the defendant with turnip seed to sow certain land of his, defendant agreed to sell to the plaintiff the whole of the turnip seed which should be produced from the land, at the price of one guinea per Winchester bushel, and deliver the same to the plaintiff at the usual time after harvest and thrashing; that the plaintiff supplied the seed, and the defendant sowed it and harvested the crop, amounting to two hundred and forty bushels of seed; that the defendant failed to deliver the turnip seed, whereby plaintiff was compelled to purchase other seed and pay therefor a higher price. On a plea of the general issue, the cause was tried before Lord Tenterden; the facts were proved as alleged in the declaration, and the court held, that, in every sense of the words, whether we look to their legal construction or to their common acceptation, this is a contract respecting the sale of goods. Being a contract for the sale of goods above the value of ten pounds, it is void, by the seventeenth section of the statute of frauds, for want of a note in writing. This decision was sustained by the court of king's bench.[2] When this contract was made it could not have been known that the crop to be raised would exceed the value of ten pounds; but the court seem to have adopted a different con-

[1] Strange, 506; 2 H. Black., 63; 7 Term R., 14; 10 John. R., 364; 18 John. R., 58.

[2] Watts v. Friend, 5 Man. and Ryl. R., 439; 10 Barn. and Cres. R., 446.

struction from that put upon that provision in the statute rendering an agreement void, which by its terms is not to be performed within a year. Such an agreement is held not to be void under the statute, where it *may* be performed within the year.[1] Part performance within the year, however, does not render the contract valid; and though actually commenced within the year, yet if it is by its terms not to be completely executed within that period, the case is within the statute.[2] Though such a contract cannot be enforced, the party who has received a benefit by a part performance and refuses to go on with it, must pay for what he has rececived; and in Vermont it is held, that the contract may be used by way of defence or protection.[3] With us, where the contract, such as a contract to convey land for a specified sum, payable in work, is void and incapable of enforcement in a court of law; the party paying the money or rendering the services in pursuance thereof, may treat it as a nullity, and recover the money paid or the value of the services rendered, under the common counts; that is, in an action for the money, or for the labor and services specifically.[4] If the contract be to convey thirty acres of land for three years' labor, the value of the premises, it seems, may be shown as a measure of damages; but even this assumes the validity of the contract so far as to render it a protection against an injury.[5]

The distinction, made in the above mentioned cases between a contract for a thing to be manufactured, such as a wagon, and a contract for a thing to be raised, such as a crop of wheat or turnip seed, does not seem to be very plain, when considered with reference to the subject matter of the contract. But there is a plain distinction between a contract which is in

[1] Lockwood v. Barnes, 3 Hill R., 128; Lower v. Winters, 7 Cowen R., 263; Moore v. Fox, 10 John. R., 244; 10 Wend. R., 426; 15 id., 336; 4 Bing. R., 40.

[2] Boydell v. Drummond, 11 East R., 142; Bracegridle v. Heald, 1 Barn. and Ald., 722; Birch v. Liverpool, 9 Barn and Cres. R., 392; Russell v. Slade, 12 Conn. R., 455.

[3] 3 Hill R., 130; Mavor v. Pine, 3 Bing. R., 285; Philbrook v. Belknap, 6 Verm. R., 383; Foot v. Emerson, 10 Verm. R., 383.

[4] King v. Brown, 2 Hill R., 485.

[5] Burlingame v. Burlingame, 7 Cowen R., 92.

substance one for labor and services, and a contract for the future delivery of a specific article of property at a stipulated price. The terms of the agreement determine whether it constitutes a contract for the sale of a thing, to be delivered at a future day, or is simply a contract for the hire of labor and services, with an accessory stipulation by the party contracting to render them, to furnish the materials to be used in building or constructing the thing ordered.[1]

The party furnishing the materials, or the principal part of them, as we have seen, retains the title during the progress of the work. Where, however, a damaged or worn out article is delivered to another to be repaired and renewed by the labor and materials of the latter, the property in the article, together with the accessorial additions, remains in the former owner during the performance of the work, notwithstanding the labor and materials used in the repairs greatly exceed the value of the article when left to be repaired. Thus, where the owner of an old wagon left it with a blacksmith who was owing him, to be repaired on account of the debt, and the blacksmith took it to pieces, purchased on his own account entirely new woodwork, with the exception of the tongue and evener, ironed it and had it painted at his own expense, when it was seized in execution as the property of the blacksmith, it was held to be the same wagon still; and, therefore, that the title was still in the original owner.[2] Mr. Justice Beardsley, delivering the opinion of the court on the case, says: "The general property must be in one party to the exclusion of the other, for surely they are not tenants in common of the thing repaired. Shall we then say, that where the value of the repairs falls below that of the dilapidated article on which they were made, the original owner has title to the article in its improved condition; and *vice versa*, where they exceed it in value, title to the article as repaired and improved, passes over to the person by whom the repairs were made? Such a rule would certainly be plain enough, and probably might be applied without great

[1] 7 John R., 473. [2] Gregory v. Stryker, 2 Denio R., 628.

difficulty, to any particular case. But it would be found to give rise to a variety of questions never heard of in actions growing out of the reparation of decayed or injured articles; and the rule itself, I am persuaded, has not so much as the shadow of authority for its support. The principle contended for by the defendant is not necessary for the security of the mechanic by whom the repairs are made. He has a lien for his labor and materials, and may retain possession until his just demands are satisfied."

Bailee's right of property.

The bailee for hire of labor and services has an interest or special property in the chattels upon which his labor and services are performed.[1] An artisan has a lien upon the article manufactured by him until he is paid for his labor, or parts with the possession pursuant to the terms of his agreement; so held in the case of a brick-maker, who manufactured a quantity of brick, on a brick-yard furnished by another with wood and other necessaries to carry on the work, the agreement being to pay the manufacturer so much per thousand for the brick made and shipped, on the return of the vessel in which the same were carried to market. Where, in such case, the brick were seized and sold as the property of the employer, under an execution against him, it was held that an action of trover lay by the brick-maker against the purchaser who removed the same; but that the purchaser might show the state of the accounts between the employer and the brick-maker, and that the latter should recover only the amount of his lien upon the brick taken by the purchaser.[2] In other words, that the general property was in the employer, and capable of being sold on an execution against him; while the special property, including the legal right to the possession, remained in the manufacturer until extinguished by a voluntary delivery.[3]

[1] 2 Denio R., 628.

[2] Moore v. Hitchcock, 4 Wend. R., 292.

[3] 4 Wend. R., 296; 3 Hill R., 491. There was in the case stated no question raised as to the right of the sheriff to seize the property on execution.

So where a quantity of cotton yarn was delivered to a bailee, upon an agreement that he should procure it to be woven into cloth and receive a commission thereon as the price of the labor;[1] and he delivered the yarn to another person to weave for him at an agreed price to be paid in goods; and the cloth, being woven, was attached as the property of the weaver; it was held that the bailee receiving the yarn to be woven into cloth, had a special property in the cloth, and that the weaver acted as his servant or agent, having no property or legal interest in the cloth.[2] The rule is the same, where logs are delivered at a saw-mill under a contract with the miller that he shall saw them into boards, within a specified time, on shares; the general property remains in the owner of the logs until the work is finished according to contract; and the bailee for hire of services can have no lien for a part or partial performance of his agreement.[3] When a manufacturer receives goods for the purpose of being wrought in the course of his trade, the contract is entire; and without a stipulation to the contrary, he has no right to demand payment until the work is complete. *A fortiori* he has no right to carve out payment for himself, without consulting the bailor. A miller is entitled to take toll from your grist, on grinding it; but suppose he chooses to grind only a part, and then sells the whole. He is not entitled to toll for what he had actually ground. It is like the common case of a man undertaking to labor during a certain time, or in performing a certain amount of work for so much; his work must be finished before he can claim payment; and if he fails to perform according to his contract, he cannot acquire by a lien that which he cannot legally demand.[4]

Where the agreement is to manufacture chattels on shares, on a completion of the work, the parties to the contract become tenants in common of the manufactured goods. At least the bailee has a right to retain the goods until a division has been made and he has been paid the stipulated com-

[1] Eaton v. Lynde, 15 Mass. R., 242.
[2] 15 Mass. R., 242.
[3] Pierce v. Schenck, 3 Hill R., 28.
[4] 3 Hill R., 30, 31.

pensation for his labor, whether it be one-tenth or one-half. Of course he acquires the absolute title to his portion of the goods from the time they are specifically set apart to him in payment.[1]

We have seen that one who receives grain or other raw materials, on an agreement to return a manufactured article without any stipulation that it shall be manufactured out of the same grain or materials, is not a bailee for labor and services, but a purchaser;[2] and that he is a bailee for labor and services where he receives wheat to be manufactured into flour, and returned in that shape.[3]

Every bailee for hire, who by his labor or skill imparts additional value to the goods, has a lien thereon for his charges, there being no special contract inconsistent with such lien. The lien exists equally, whether there be an agreement to pay a stipulated price, or only an implied contract to pay a reasonable price, unless there be a future time of payment fixed. In that case the special agreement would be inconsistent with the right of lien, and would distroy it.[4]

The bailee's lien extends to every portion of the goods or materials delivered under one contract, and is not confined to the particular portion, *pro rata*, on which the labor has been bestowed; so that the bailee by a delivery of a part of the manufactured goods, does not defeat his lien upon the remainder for his whole services.[5] So, too, where several parcels of goods, belonging to one owner, are carried the same voyage, a delivery of part of them does not divest the carrier of his lien on the remainder for the whole freight.[6]

The bailee having a special property in goods intrusted to him, and a lien upon them, has such an interest in the goods that he may procure an insurance thereon; and in case of a loss, he may recover upon proving his special interest.

[1] 3 Hill R., 28.

[2] Smith v. Clark, 21 Wend. R., 83.

[3] Mallory v. Willis, 4 Comst. R., 76.

[4] Blake v. Nicholson, 3 Maule. and Selw. R., 168; Chase v. Wetmore, 5 id., 180; Crawshay v. Homfray, 4 Barn. and Ald. R., 50; Burdick v. Murray, 3 Verm. R., 302.

[5] Morgan v. Congdon, 4 Comst. R., 552.

[6] Schmidt v. Blood, 9 Wend. R., 268; McFarland v. Wheeler, 26 id., 467.

Thus, a common carrier who insures a cargo, accepted by him to carry from New-York to Buffalo, against all losses, excepting those occasioned by theft, robbery or barratry of the master or crew of the vessel on which they are shipped or want of ordinary care and skill, may recover the full value of the goods insured on showing a loss by fire, for which he is answerable.[1] He recovers to the extent of his interest, provided it does not exceed the amount of the insurance; and his interest in this case is measured by his liability.

A bailee who receives a quantity of skins to be tanned by him, may maintain trespass against those who take them from him without paying for what he has done, before he has finished his labor on them; even an order of the bailor will not justify the seizure.[2] But if the bailee do any act in respect to the bailed chattels inconsistent with the contract under which he received them, as if he pawn the property, the owner may recover it from the pawnee in an action in the nature of trover, without tendering the sum for which it was pawned.[3] The work being completed, the bailor as against third persons and strangers, has the right of immediate possession. Accordingly, where rags are delivered to a manufacturer at a certain price, under a special contract, to be made into paper, which is to be returned at a certain price, the difference to be paid by a note, and the paper is under the agreement manufactured out of the identical rags, the action of trespass in the name of the bailor lies against a creditor of the manufacturer for levying on the paper as the property of the bailee.[4]

Loss, by whom borne.

The owner of goods bailed, lost or destroyed without neglect on the part of the bailee, must bear the loss.[5] And

[1] Van Natta v. Mutual Security Ins. Co., 2 Sand R., 490.

[2] Burdict v. Murray, 3 Verm. R., 302.

[3] Gallaher v. Cohen, 1 Browne, 43.

[4] King v. Humphreys, 10 Barr. R., 217.

[5] Seymour v. Brown, 19 John. R., 44. This case is overruled by Hurd v. West, 7 Cowen R., 752; Norton v. Woodruff, 2 Comst. R., 153.

so where a mechanic or manufacturer is employed to make or manufacture an article out of his own materials; as the title remains in him until the finished article is delivered, he must bear the loss in case it is destroyed by accident or otherwise.[1] But if materials are delivered to him to manufacture, or if an article is intrusted to him to be repaired in the course of his business, and it be accidentally destroyed before the work is completed, the loss falls upon him who owns the property;[2] for the bailee is answerable only for ordinary diligence. And hence it has been held that an action lies by a shipwright for work and labor done, and materials delivered in repairing a ship, which is casually burnt in the dock by a fire communicated from an adjacent building, before the repairs are completed.[3]

Where a builder is employed to build a ship under a special contract, like that shown in the case of Woods v. Russell, by which the payments were to be made in installments as the work progressed, the builder would be certain to lose his unpaid services in case of a loss by fire or other casualty whilst the ship remained unfinished, because the payments on his contract only became due as the work advanced on the ship from stage to stage.[4] Whilst the title remains in the builder, the hazard of loss is borne by him; and as he bestows his labor and services upon his own property, he cannot recover for them as a separate demand.[5] If the contract be general, as where one engages to build a carriage for another at a stipulated or for a reasonable price, no title vests in the person ordering it, and the builder has only a right of action on the contract to make and deliver the carriage. Till the work is finished and delivered according to agreement, the builder has no claim whatever upon his employer.[6] The danger of loss is his alone.

[1] 3 Mason R., 478; Story on Bailm., § 426.
[2] 2 Kent's Comm., 591.
[3] Menetone v. Athawes, 3 Burr. R., 1592.
[4] 5 Barn. and Ald. R., 942.
[5] Atkinson v. Bell, 8 Barn. and Cres. R., 277.
[6] Mixer v Howarth, 21 Pick. R., 207.

On the other hand, the bailee, who receives materials to be manufactured, may undoubtedly recover for the labor and services actually bestowed upon them, notwithstanding a loss of them, without his fault, before the work is finished. This being simply a contract for labor and services to be performed upon the property of another, the bailee is entitled to demand a compensation for the work actually done.[1] And he may also recover for materials furnished, when the same are incidental and accessary to the principal materials furnished by his employer.[2]

Under the Code of Louisiana, when the builder, who is termed the undertaker, furnishes the materials for the work, if the work be destroyed, in whatever manner it may happen, previous to its being delivered to the owner, the loss is sustained by the undertaker, unless the proprietor be in default for not receiving it, though duly notified so to do.[3] When the mechanic or builder only furnishes his work and industry, should the thing be destroyed, he is only liable in case the loss has been occasioned by his fault;[4] if destroyed by accident before delivery, without any fault on his part, the builder loses his services, notwithstanding the owner is in default for not receiving it, unless the destruction be owing to the badness of the materials used.

Hire of labor and services generally.

At common law, where materials are delivered to be manufactured, and the work done upon them is not properly performed, the bailee cannot demand compensation therefor; for it is a principle that where there has been no beneficial service there shall be no pay.[5] This rule applies also to a demand for labor and services where there has been no contract of bailment. In an action for work and labor, as a surgeon and apothecary, and for medicines administered,

[1] 3 Burr., 1592; Gillett v. Mawman, 1 Taunt. R., 137; 2 Kent's Comm., 591.
[2] 3 Burr. R., 1592.
[3] Code, art. 2729.
[4] Code, art. 2730.
[5] Farnsworth v. Garrard, 1 Campb. R., 38.

where testimony was introduced tending to show improper treatment by the plaintiff, Lord Kenyon held, that in a case where the demand is compounded of skill and things administered, if the skill, which is a principal part, is wanting, the action fails, because the defendant has received no benefit; and he left it to the jury to say whether plaintiff had misconducted himself or evinced a want of requisite skill.[1] So, if a surveyor makes an estimate which turns out to be incorrect, to a considerable amount, through his omitting to examine the ground for the foundation of the work, he is not entitled to recover anything for his plans, specifications, or estimates made for the work; if he go upon the information he receives from others which turns out to be false, he must take the consequences, for he is bound to use due diligence in the business in which he is employed. Employed as an engineer for erecting a bridge, he is bound to ascertain for himself by actual experiments the nature of the soil.[2] So, if an auctioneer, employed to sell an estate, is guilty of negligence whereby the sale becomes nugatory, he is not entitled to recover any compensation for his services from the vendor; he cannot recover for services rendered wholly abortive through his own neglect.[3]

If there be a contract for the hiring of labor and services, for a certain period, or for a particular piece of work, though no price be agreed upon, the party employed must show a strict performance on his part according to his agreement before he can recover for his work and labor. The contract being entire, he cannot recover for a part performance.[4] But if by his agreement he be entitled to payment as fast as his work is done, he may collect the same in an action; but his employer may show in diminution of his claim damages sustained by him in consequence of the non-performance of the contract under which the services were rendered.[5]

[1] Kannen v. McMullen, Peake N. P. R., 59.
[2] Moneypenny v. Hartland, 1 Carr. and Payne R., 352; 2 id., 378.
[3] Denew v. Daverrell, 3 Campb. R., 451.
[4] 1 Cowen's Trea., 127, 3d ed.
[5] Sickles v. Pattison, 14 Wend. R., 257.

An infant who engages to work for a certain length of time, may recover for a part performance of his contract, because he may rescind the contract and bring his action for the value of the services. In this case, however, he recovers only the actual worth of his services, taking into account whatever injury his employer sustains in consequence of the disappointment he meets with by this avoidance of the contract.[1] The agreement, as such, is not taken into the account at all, but the value of the services is estimated with a view to the circumstances attending the employment, and the bad faith practiced by the infant.

Under an agreement to work for ten and a half months in spinning yarn at so much per run, the contract is held to be entire; so that the whole work must be performed as a condition precedent to any right of action for services rendered.[2] Where the contract is for so many months' service at so much per month, the price becomes due only when the work is done. Like every other contractor, the party who engages to perform work, labor and services must perform strictly the stipulations of his agreement. If he enters into a special contract, and performs part of it, and then without cause, or the consent or fault of the other party, but of his own mere volition, abandons the performance, he cannot recover on an implied assumpsit for the labor actually performed.[3] If the contract be modified by the agreement of the parties, he may recover for the services previously rendered; as where there was a contract of hiring for one year at one dollar per day, with a stipulation for a settlement at the end of every three months, and at the end of the first three months a computation was had between the parties, of the amount due on the contract, and a note was given therefor on which an action was brought, it was held no defence that the payee of the note had abandoned the contract and left the service before the expiration of the year.[4]

[1] 2 Pick. R., 332.

[2] McMillan v. Vanderlip, 12 John. R., 165.

[3] Jennings v. Camp, 13 John. R., 95; 8 Cowen R., 63; 19 John. R., 337; 13 John. R., 94.

[4] Thorpe v. White, 13 John. R., 53.

Any act of the parties, which shows a mutual consent to vary the terms of the contract, will raise an implied promise to pay for the work subsequently done.[1]

Where the plaintiff agreed to lay a quantity of stone wall and dig a certain ditch for a stipulated compensation, the work to be completed at a certain time, and the plaintiff commenced the work, but failing to complete it by the appointed time, the defendant told him to go on with the job, and he would turn in and help him on being allowed a compensation for his services, and did so until the work was finally finished, it was adjudged that the new arrangement raised an implied promise to pay for the services rendered; but that the new agreement did not operate as a waiver of any damages which the employer had sustained in consequence of the non-fulfillment of the contract within the time stipulated; that the defendant had a right to recoupe such damages in an action for the services, but that he must give previous notice of his intention to do so. The defendant often has an election either to bring a cross action or to set up his claim by way of recouping damages;[2] and without a notice the plaintiff may be surprised on the trial by a defence which he is wholly unprepared to meet. Under our former practice this defence could not be pleaded in bar, because it admits that the plaintiff has a right to sue, and seeks to recoupe damages on the ground that the plaintiff has failed to perform some stipulation in the contract which was obligatory upon him.

Where a servant hires himself for a fortnight and quits at the end of ten days in consequence of rough language from his employer, he is not entitled to recover compensation for the ten days labor; and it seems that the employer may turn away a servant without compensation, who refuses to obey his lawful and reasonable commands.[3] The use of improper and harsh language does not avoid or rescind the contract;

[1] Jewell v. Schroeppel, 4 Cowen R., 564.

[2] Barber v. Rose, 5 Hill R., 76; 12 Wend. R., 246; 3 id., 238; 2 id., 431; Van Epps v. Harrison, 5 Hill R., 63.

[3] Marsh v. Rulesson, 1 Wend. R., 514.

for the law does not undertake to enforce civility of speech, so long as the parties perform their agreements.

In an action to recover for the amount of repairs done to a vessel under a special contract, if there has been a deviation from the contract by mutual consent of the parties, so that its terms are not applicable to the new work ordered, the contractor may recover for the new work upon a *quantum meruit;* the agreement is followed as the rule of compensation so far as it goes.[1] Plaintiff had declared upon the common counts for work and labor done, and materials found. It appeared in evidence that a special agreement had been entered into for repairing the vessel, according to an estimate which had been made, pursuant to which the plaintiff was to be paid certain sums at specified periods, viz., one hundred pounds at the end of a fortnight; the like sum at the end of four weeks, and at the end of six weeks; and the remaining sum of three hundred and twenty pounds by an approved bill at six months, with interest. The six months had not expired. After the repairs had been proceeded in to a considerable extent, the parties deviated from the original plan, and the repairs had been completed in a manner to which the estimate already made did not apply. Gibbs, C. J.: "I am of opinion that there is no ground for nonsuiting the plaintiff. I have always understood the rule to be, that you may recover for work executed, as for work and labor generally, if the terms contained in the written agreement are not of such a nature as to preclude a recovery otherwise than on the contract itself. It is every day's experience, that a party may recover on the general counts for work done under a special contract; but this case does not range itself within that class, for here are particular terms which render it impossible to recover under the common count. But it appears here that additional work has been done under a subsequent order, and it is not pretended that this was to be paid for according to the terms of the original agreement, for by that, particular sums were to be paid at specified

[1] Robson v. Godfrey, 1 Stak. R., 220; Pepper v. Burland, Peake N. P. C., 103; Ellis v. Hamlet, 3 Taunt. R., 52.

periods, and the remainder by an approved bill at six months; but there was nothing in the original agreement to govern the new work according to these stipulations; on the contrary, the parties proceed upon the ground that the terms of the agreement were not applicable to the new work, and therefore the time of payment cannot be applicable. The plaintiff, therefore, is entitled to recover on the general count for work and labor done at defendant's request, for the additional work; but as to so much as arises out of the special contract, I do not see how he can recover, since, according to that contract, payment is not yet due."

When the parties deviate from the terms of a special contract, the contract price will, in general, so far as applicable, be the rule of damages. But when the contract is terminated by one party against the consent of the other, the latter will not be confined to the contract price, but may bring his action for a breach of the contract and recover as damages all that he may lose by way of profits in not being allowed to fulfill the contract; or he may waive the contract and bring his action on the common counts for work and labor generally, and recover what the work done is actually worth. In the latter case he will not be allowed to recover as damages anything for speculative profits; the actual value of the work and materials is the measure of his damages. If he seeks to recover more than the actual worth of his work done, in a case where he has been prevented from performing the entire contract, he must resort to his action directly upon the contract; if he elects to consider the contract rescinded, and goes upon the *quantum meruit*, the actual value of the services and work performed is the rule of damages.[1]

Where work is done and materials furnished under a special contract, as for the materials and labor necessary to complete the excavation, back-filling, ramming and repaving of a trench for water pipes at so much per foot, the compensation is limited and restricted to the express terms of the agreement; notwithstanding it turns out unexpectedly

[1] Clark v. The Mayor, &c., of New-York, 4 Comst. R., 338.

that a part of the excavation has to be made through hard pan and solid rock, at an expense ten times greater than that made in common earth.[1] A contract prohibited by law, whether for labor and services or any other object, is void.[2]

Neither can a suit for labor and services be maintained where they are shown to have been rendered with an understanding that they should be compensated for by a provision in the employer's will, and such a compensation is actually made.[3] But where a young man at the request of his uncle, went to live with him, and the uncle promised to do by him as his own child, and he lived and worked for him above eleven years, and the uncle said that his nephew should be one of his heirs, and spoke of advancing a sum of money to purchase a farm for him, as a compensation for his services, but died without devising anything to him or making him any compensation, it was held that an action on an implied assumpsit would lie against the executors for the work and labor performed for the testator.[4] A son who, after he comes of age, lives with and works for his father, on a promise that he will reward him well, and provide for him in his will, though he cannot maintain an action to recover compensation during the lifetime of his father, has a legal claim for a reasonable recompense for his services.[5]

The law implies a promise to pay for services rendered upon request, unless it appear that there is an understanding that no compensation shall be rendered. Accordingly, where one purchased the time of a negro about the period when the emancipation act took effect in this state, till he should be twenty-eight years old, for a valuable and full consideration, both the negro and the vendee supposing he was bound that length of time, though the negro was in fact a free man, it was adjudged that the law does not imply a promise to pay for the negro's services.[6] The case of Alfred v. Fitz James is

[1] Sherman v. The Mayor, &c., of New-York, 1 Comst. R., 316.
[2] Jackson v. Walker, 5 Hill R., 27; and 7 Hill R., 387.
[3] Eaton v. Benton, 2 Hill R., 576.
[4] Jacobson v. Ex'rs of La Grange, 3 John. R., 199.
[5] Patterson v. Patterson, 13 John. R., 379.
[6] Livingston v. Ackeston, 5 Cowen R., 531.

to the same effect. It appeared, in that case, that the plaintiff, a colored man, came over to England from Martinique with the duchess of Fitz James, having been born a slave on an estate belonging to her in that island. There was no contract of hiring for wages; but a witness said the marquis had been heard to promise him wages. Lord Kenyon ruled that up to the time of the promise to pay wages, the plaintiff could not recover, as there was no original contract of service for wages.[1]

Where an article is made by a mechanic, pursuant to an agreement, and tendered to the person for whom it is made, and then, on his declining to receive it, left with a neighbor for him, an action may be maintained for its value, alleging the contract and the delivery; for such an offer or tender of the article is tantamount to a delivery.[2] If by the terms of the contract the work is to be commenced under the direction of the party for whom it is to be done, he has no right to delay giving the directions so as to prevent the completion of the work within the time agreed upon. And the party, prevented in this manner from performing the work within the stipulated time, if he subsequently does the work at an expense enhanced in consequence of the delay, is not obliged to bring his action upon the contract, but may resort to the *quantum meruit* to obtain his indemnity.[3] If the work is done under the contract, however, at estimated prices, and there is a deviation from the original plan by the consent of the parties, the estimate is to be the rule of payment as far as the special contract can be traced; and for the extra labor, and the additional expense incurred in consequence of the party's being obliged to do the work under disadvantageous circumstances, occasioned by the opposite party, he is entitled to his *quantum meruit*.[4]

If the employer be the cause of the delay, as if he fail to furnish the materials in due time according to contract, the

[1] 3 Esp. R., 4.

[2] Bement v. Smith, 15 Wend. R., 493.

[3] Dubois v. Delaware and Hudson Canal Co., 4 Wend. R., 285.

[4] 4 Wend. R., 285.

contractor may rescind the contract; but if having agreed to do certain mason work in the building of a house at stipulated prices, the materials to be furnished by the owner, he quits the job, after having done part of the work, in consequence of the owner's neglect to furnish the materials in season, it is held that the contract prices are the measure of compensation, unless it is made to appear that the work done was rendered more expensive to the mason than was contemplated when the contract was made, or than it would otherwise have been, in consequence of the neglect to furnish the materials. If compelled to do the work at an additional expense in a less favorable season, he may recover what his work was reasonably worth ;[1] in other words, he recovers the contract prices, where he works under the contract, with such additional expenses as he is put to by the delay to which he is subjected. This appears to be the just and legal rule of damages.[2] But if, in such a case the action be brought generally for work and labor, the defendant may give in evidence the special contract, with a view to lessen the quantum of damages; and the prices mentioned in it are, as a general rule, to be taken as the best evidence of the value of the work.[3]

One who agrees to furnish materials of a given quality and manufacture for another an article out of them, cannot recover any increase of price in consequence of his putting into it a better kind of materials,[4] nor can he recover any increase of compensation on the ground that the owner has, at his request, consented to a deviation from the contract, unless the deviation be such as to imply an increase of expense.[5] Though there be an agreement under seal, if the work is not in fact done under it, but under the supervision of the employer, the party doing the work may recover

[1] Koon v. Greenman, 7 Wend. R., 121.

[2] 7 Wend. R, 123; 1 Holt, N. P., 236; 1 Stark. R., 220; 10 John. R., 36; 4 Wend. R., 285.

[3] 7 Wend. R., 123.

[4] 3 Carr. and Payne, 453.

[5] 1 Mood. and Rob., 218.

under a general count in assumpsit for work and labor. If in such a case, when the time stipulated for performance arrives, the contractor goes on with the knowledge and assent of his employer, or without his making any objection, to complete the work subsequently, this is evidence of a promise to pay for the work.[1] And it is no objection to his action on this promise, that his employer has previously sued him in covenant and recovered damages for his not performing in time. He cannot here recover on the covenant, because he cannot show performance on his part; but as he performs work for his employer with his approbation, the law implies a promise to pay therefor what it is reasonably worth.[2]

Wherever services have been performed at the request of another, there is a promise raised by law to pay for them what they are worth. In England a counselor at law cannot recover for his services in an action, nor is he liable to answer in a suit for neglect or want of skill in managing a cause committed to him.[3] With us it is held that he may recover for his services on a *quantum meruit*; and that the relation between him and his client is one of contract, either express or implied.[4] The English rule on this subject, which applies equally to the medical practitioner, was derived from the civil law.[5] In delivering the opinion in Adams v. Stevens, Chancellor Walworth says: "Among the early institutions of Rome, when the relation of patron and client existed between the patrician and plebeian, the patron, who had accepted the promise of fidelity from the client, was bound to render him advice and assistance, and to sustain him in his litigations, without any other fee or reward than that which the client was bound to render him at all times. The relation which existed between them was similar to that of parent and child, or rather that of master and slave. But in the progress of society, when the relations of patron and client

[1] 4 Cowen R., 564.

[2] 4 Cowen R., 566; Lawrence v. Dale, 3 John. Ch. R., 23.

[3] 2 Com. on Con., 378; Peake's N. P. C., 123, 96.

[4] Stevens v. Adams, 23 Wend. R., 57; 26 id., 451.

[5] Chorley v. Bolcot, 4 Term. R., 317; Lipsecombe v. Holmes, 2 Campb. N. P., 441.

towards each other had totally changed, when the business of advocating causes in the courts had become a profession, and before the credit system pervaded all the relations of life, the client paid his advocate a fee in advance for his services which was called a gratuity or present.[1] As this was a mere honorary recompense, the client was under no legal obligation to pay it. The result necessarily was, that if the usual present was not given, the advocate did not consider himself bound in honor to undertake the advocacy of the cause before the courts."

In England the constitution of society is such that a remnant of this relation may exist, enough, evidently, to uphold an established principle among a people so tenacious as they are of ancient forms and precedents. But with us the relation, though one of honor and confidence, is also one of contract. And hence, no doubt the counselor at law must prove affirmatively the value of his services, and may be defeated in his action by the same defence which will prevent a recovery in any other action for labor and services.[2] If in such an action the defence goes to destroy the plaintiff's claim entirely, it may be given in evidence under a general denial; if it go merely to reduce the damages, notice should be given. This was the rule under our former practice.[3] An attorney cannot recover for services rendered valueless through his negligence; and he cannot recover costs against his client for services in recovering a judgment which is set aside for irregularity, nor can he recover the costs of opposing the motion to set aside his irregular proceedings, nor for money paid to satisfy the costs of a judgment of discontinuance suffered through his negligence or ignorance. The attorney is bound to know what the law is; if having a note placed in his hands for collection, he bring a suit thereon on the last day of grace, the bringing

[1] 26 Wend. R., 453.

[2] Grant v. Button, 14 John. R., 377; 4 Cowen R., 564; Gleason v. Clark, 9 Cowen R., 57.

[3] Runyan v. Nichols, 11 John. R., 547; Sill v. Hood, 15 John. R., 231; 9 Cowen R., 57.

of such suit will be imputed either to his ignorance or negligence; and in either case he cannot recover against his client for such fruitless services.[1]

The attorney is not answerable for a mistake made on a nice point of practice, or on a point of law in respect to which there is a reasonable doubt;[2] nor is the attorney responsible even for a mistake, unless a damage has resulted to his client therefrom.[3] Being bound to observe the lawful instructions of his client, he is liable for all damages occasioned by his disregarding them.[4] In an action for his services, he must prove a retainer from his client, or that his services were rendered with the knowledge and consent of his client, from which, as in other cases, an employment will be implied by law.[5] Some recognition of the attorney by the client in the business or progress of the suit, is necessary to be shown to authorize a recovery for services. But where an attorney appears and defends for another, and receives money as attorney due to his assumed client, he is estopped from afterwards denying that he was the attorney.[6]

A minister may maintain an action for his services as such, on a promise to pay him so much per year; the payments being made half yearly, the agreement is not within the statute of frauds.[7] Indeed, the rule is general, that where services are rendered upon request, there is an implied promise to pay for them what they are reasonably worth; and a request may be inferred wherever the services are rendered with the knowledge or under the supervision of the employer.

A committee appointed by a public meeting to carry into effect the objects of the meeting, such as to make arrangements for the celebration of a public event, are liable for labor and services performed at their request;[8] and if they

[1] Hopping v. Quin, 12 Wend. R., 517.
[2] 4 Burr., 2060; 3 Barn. and Cres. R., 738.
[3] 7 Bing. R., 413.
[4] 8 Mass. R., 57.
[5] Hotchkiss v. Le Roy, 9 John R., 142.
[6] McFarland v. Crary, 8 Cowen R., 253.
[7] Moore v. Fox, 10 John. R., 244.
[8] McCartee v. Chambers, 6 Wend. R., 649.

plead in abatement the non-joinder of the persons composing the meeting, a judgment upon the verdict found is final; by employing the workmen the committee render themselves liable.

Labor and service voluntarily done and performed by the plaintiff for the defendant, without his privity or request, however meritorious or beneficial they may be to the defendant, as in saving his property from destruction by fire, afford no ground of action. If a man humanely bestows his labor, and even risks his life in voluntarily aiding to preserve his neighbor's house from destruction by fire, the law considers the service rendered as gratuitous.[1] So when a parol agreement for the purchase of a farm is rescinded, though the money paid may be recovered back, nothing can be recovered for the improvements and work and labor bestowed upon the premises.[2] Where, however, one entered upon land under a parol contract for a written lease for seven years, and was to make improvements thereon, and, after he had done part of the work the other party refused to execute the lease, it was adjudged that he might maintain an action for the work done.[3]

Services rendered for the benefit of another, with his tacit assent, raise an implied promise to pay therefor, unless it be shown that they were rendered on the credit of another person.[4] But a person entitled to the services of another, standing by and permitting a third person to avail himself of such services, without interposing a claim, or giving notice of his right, cannot maintain an action for such services; so held, where a slave was bequeathed by will to a son-in-law, and a son of the testator, who had a bill of sale of the slave, permitted him to labor for the son-in-law, without giving notice of his claim.[5]

[1] Bartholomew v. Jackson, 20 John. R., 28.
[2] Gillet v. Maynard, 5 John. R., 85.
[3] Alcorn v. Harmonson, 2 Blackf. R., 235; Roach v. Wade, 4 Monr. R., 523.
[4] James v. Bixby, 11 Mass. R., 37; 14 id., 176.
[5] Demyer v. Souzer, 6 Wend. R., 436.

Care demanded.

Ordinary care and diligence are demanded of every bailee when the contract of bailment is beneficial to both parties.[1] The rule is the same whether the reward be payable in money, or in some other valuable thing or service; as in the contract *facio ut facias*, where two persons agree to perform reciprocal works. For instance, if a mason and a carpenter have each respectively undertaken to build an edifice, and they mutually agree, that the first shall finish all the masonry, and the second all the wood-work in their respective buildings; here the consideration is labor and service done and rendered on both sides, and the contract is one of a gainful nature. So, if a silversmith agree with an architect to receive his silver, and work it for him into plate, on consideration that the architect shall receive his lumber and materials, and frame them for him into a house, the agreement is the same in legal effect as if each had stipulated for a payment of his services in money.[2] So, also, says Sir William Jones, with his usual felicity of illustration; "when Jacob undertook the care of Laban's flocks and herds for no less a reward than his younger daughter, whom he loved so passionately that seven years were in his eyes like a few days, he was bound to be just as vigilant as if he had been paid in shekels of silver." But it is observable that the patriarch, like all ordinary men, did in fact become a little more vigilant under his subsequent contract by which he was to be rewarded for his services with the spotted and striped increase of the flocks and herds.[3]

A workman for hire is not only bound to guard the thing bailed to him against ordinary hazards, but likewise to exert himself to preserve it from any unexpected danger to which it may be exposed.[4] The defendant, being proprietor of a dock on the river Thames, received into it plaintiff's ship for repairs; whilst there, the workmen being all absent at

[1] Jones on Bailm., 119; 2 Kent's Comm., 587.
[2] Jones on Bailm., 93, 94.
[3] Jones on Bailm, 94.
[4] Leck v. Maester, 1 Campb. R., 138.

dinner except a watchman, the tide ran remarkably high, and the dock gates, being rotten, gave way and the ship was forced against another vessel and greatly injured; and Lord Ellenborough held that it was the duty of the defendant to have had a sufficient number of men in the dock to take measures of precaution, when the danger was approaching, and that he was clearly answerable for the effects of this deficiency.[1]

The workman for hire is bound to take at least as good care of the chattels intrusted to him as he does of his own goods; if he take less, he is liable, for that raises a presumption against him.[2] In Clark v. Earnshaw, the declaration stated that in consideration the plaintiff would deliver to the defendent, who was a watchmaker, a time piece known as a chronometer watch, to be cleaned and repaired by him in the way of his trade, the defendant undertook to take reasonable care of it. Defendant received the watch to repair; had in his service a person named Warren, eighteen years of age, who had been well recommended to him, and slept in his shop for the purpose of protecting the property in it. Instead of doing so, Warren, in the night time, stole the watch in question, together with some other watches, of which a part belonged to defendant, and the rest to persons who had employed him to repair them. The articles stolen were deposited in a drawer, which was affixed to the shop board and locked; the lock of which had been forced. The defendant had in a recess in his shop an iron chest, in which watches belonging to himself, of the value of several thousand pounds, were locked up; and which chest had not been, and could not easily be broken open; the outer doors, windows and shutters were properly and securely fastened; several watchmakers being called as witnesses, testified that it was invariably their habit to lock up at night in an iron safe, or other place of equal security, all watches in their custody; and it was adjudged that the defendant was liable, as he had taken care of his own property by locking

[1] 1 Campb. R., 138; Jones on Bailm., 90 to 94.

[2] Gow. R., 30, Clark v. Earnshaw; Harris v. Packwood; 3 Taunt. R., 264.

it up and securing it; and that he was bound to protect the property from depredations from those who were within the house.[1]

The bailee, however, is not liable for the loss of goods destroyed by fire, communicated from an adjacent building, or otherwise without fault on his part;[2] and hence he may recover for services and materials done and furnished upon such goods, notwithstanding their destruction. But although, in general, the workman is entitled to be paid for his labor where the work is destroyed without any fault on his part before it is completed and delivered to the employer, yet, it seems, the law in this respect may be controlled by the usage of a particular trade.[3] A, being intrusted with goods belonging to B, undertook to get them insured, and did effect an insurance in his own name upon property on his own premises, without making in the policy any mention of goods held in trust; afterwards the premises were destroyed by fire, and A received the amount of his insurance, but not enough to cover the amount of his own loss; and it was held that no part of this money could be considered as received on account of B, and that it could not therefore be set off in an action for work and labor brought by A against B.[4]

In determining what shall be considered ordinary care and diligence, a due respect must be had to the value and nature of the thing bailed; thus, peculiar care is demanded in removing and raising a fine column of granite or porphyry, so as not to injure the shaft or capital.[5] The care must be proportioned to the danger; and hence a thing which may be easily injured should be guarded with so much the greater diligence.[6]

The bailee, for labor and services, is not liable for property bailed, which is destroyed by inevitable accident, unless by

[1] Gow. R., 30.
[2] Menetone v. Athawes, 3 Burr. R., 1592.
[3] Gillet v. Mawman, 1 Taunt. R., 136.
[4] 1 Taunt. R., 136.
[5] Jones on Bailm., 98.
[6] 2 Kent's Comm., 587; Jones on Bailm., 98, 99; 1 Campb. R., 138.

his delay in finishing the work he has given occasion to the loss.[1] The property being shown to have been injured when it was returned, the owner in an action to recover damages must give some evidence that the injury was caused by the negligence of the bailee. Cooper v. Barton was an action of assumpsit for not taking proper care of a horse hired by defendant of plaintiff:[2] plaintiff on the trial proved the hiring of the horse; that it was returned to him with his knees broken in consequence of a fall whilst used by the defendant, and that the horse before that time had been often let to hire, and had never fallen down. Upon this state of facts, it was contended that the evidence was such that the case should be submitted to the jury, but Le Blanc, J., held that plaintiff is bound to give some evidence of negligence, and that as the plaintiff gave none, he must be nonsuited. This was a case of simple hire, but the rule of liability is the same here as in a bailment for labor and services.[3]

It is not necessary in this connection to enter more at length into this subject; under all contracts of bailment by which the bailee is to receive a reward for his services, he is bound for at least ordinary care and diligence; and he is not answerable if the thing bailed be lost, destroyed or injured without his fault; that is to say, he is not responsible for the loss or injury, provided he has exercised the same degree of diligence in respect to it, which the generality of mankind use in keeping and guarding their own goods.[4] In cases of loss by internal decay, robbery, theft, fire, superior force or other casualty, his liability depends upon the settlement of the question of fact, namely, whether the loss was caused by his failure to exercise the requisite care and diligence.[5] He is not answerable for the direct and natural consequences flowing from causes like these; but he is sometimes respon-

[1] Pattison v. Wallace, 1 Stew. R., 48; Francis v. Castleman, 4 Bibb. R., 282.

[2] 3 Campb. R., 5.

[3] Jones on Bailm., 119. After a hired horse is exhausted and has refused its feed, the hirer is bound not to use it. Bray v. Mayne, 1 Gow. R., 1.

[4] Jones on Bailm., 88; Story on Bailm., § 437.

[5] Jones on Bailm., 98, 119, 120.

sible for them where he has given occasion to the loss or injury by omitting to provide against them, or by conduct which subjects the property to the hazard of such perils and dangers.

Degree of skill required.

The bailee receiving materials to manufacture, or goods of any kind to perform work upon them, impliedly engages to perform his undertaking in a skillful and workmanlike manner.[1] Where he receives them in the course of his business, he is understood to engage that he possesses the requisite skill; for, though the law exacts no impossible things, yet it justly requires that every man should know his own capacity before he undertakes to do an act, and that he should be able to do the work which he holds himself out to the world as competent to perform.[2] Having the requisite skill in his art, trade or business, he impliedly contracts to use a degree of diligence adequate to the performance of the work undertaken.[3] If, however, an unskillful man yield to the pressing request of his friend, who could not otherwise have his work performed, and engage reluctantly in the business, no higher degree of diligence can be demanded of him than a fair use of his skill, such as it is.[4]

As a general rule, the law implies that every one who undertakes any office, employment, trust, or duty, contracts with those who employ or intrust him, to perform it with integrity, diligence and skill; and, if by his want of either of those qualities any injury accrues to individuals, they have therefore their remedy in damages by a special action on the case, as it was formerly called.[5] But where one is employed to transact a business, or do some work which does not belong to his calling or trade, the law implies no such general undertaking.

[1] Jones on Bailm., 23, 90; 2 Kent's Comm., 588.
[2] Jones on Bailm., 53.
[3] Story on Bailm., § 431; Jones on Bailm., 23.
[4] Jones on Bailm., 53.
[5] 3 Black. Comm., 165.

As to third persons and strangers, the party engaging in any work is answerable for all injuries resulting from his want of skill, whether it be in the course of his own particular business or otherwise.[1] Though he have a right to do the act, yet if in consequence of his want of care and skill in doing it, as in the laying of the foundations of a house about to be erected, a damage is sustained by another who is the owner of an adjoining house, he is answerable for the injury.[2]

Mr. Justice Story expresses the opinion, that in cases where skill is required, it is to be understood that it means ordinary skill in the particular business or employment which the bailee undertakes, or in which he is engaged; that reasonable skill constitutes the measure of the engagement of the workman in regard to the thing undertaken.[3] This is also the rule as laid down by Sir William Jones; the workman must perform the work he undertakes in the course of his business or profession in a workmanly manner[4].

The principle here laid down extends equally to professional men, physicians and lawyers, who, like all other men, are required by law to possess reasonable science and skill in the discharge of the duties which they voluntarily assume.[5] And they are bound also to exercise diligence in the discharge of those duties. Though they be skillful men, if in a particular case they act rashly, with a want of skill, or by way of experiment, so as to injure the person by whom they are employed, they are liable; and where a verdict, evidently just, has been found against them on an allegation of unskillful conduct, the court will not look with eagle eyes into the testimony to ascertain whether the injury did not in fact result from a trespass, as in breaking anew a limb that had been broken and half healed, or in using experimentally a new instrument by way of straightening the limb.[6]

[1] Wright v. Wilcox, 19 Wend. R., 343; Newton v. Pope, 1 Cowen R., 109.

[2] Skelding v. Whitney, 3 Wend. R., 154; 4 Comst. R., 195; Hay v. Cohoes Company, 2 Comst. R., 159.

[3] Story on Bailm., § 433.

[4] Jones on Bailm., 90, 93, 94.

[5] Seare v. Prentice, 8 East R., 349; 2 Wils. R., 325, Russel v. Palmer.

[6] Slater v. Baker, 2 Wils. R., 359.

The action for damages resulting from negligence and unskillful conduct, cannot be maintained where the plaintiff has by his neglect contributed to the injury; that is to say, if the injury has resulted from the negligence of both parties, without any intentional wrong on the part of either, no action can be maintained.[1] This is a principle of general application; but no one can excuse himself for a voluntary wrong by alleging negligence on the part of the person injured.[2]

A count in a declaration or complaint, stating that the plaintiff retained the defendant, who was a carpenter, to repair a house before a given day; that the defendant accepted the retainer, but did not perform the work within the time, in consequence of which the walls of plaintiff's house were damaged, cannot be supported, because it does not allege the making of a valid contract. But a count, stating that plaintiff being possessed of some old materials, retained the defendant to perform the carpenter's work on certain buildings of his, and to use in the work those materials, but that the defendant instead of using them made use of new ones, thereby increasing the expense, may be sustained; for the reason that the entrance upon the work is a consideration, sufficient to support the contract.[3]

One who is employed as an agent to transact business or do work for another, is bound to observe the directions of his employer in respect to the work. Thus, if directions are given by a principal to his agent to insure goods in his hands, and he omits to do so without giving his principal notice of the omission, he will be liable for negligence.[4] If he undertake to effect an insurance, and fail in doing so, it is his duty to give notice to his principal; and it has been held that assumpsit will lie for the breach of such duty, and that the promise laid in the declaration, where the defendant

[1] Brownell v. Flagler, 5 Hill R., 282, and cases there cited.
[2] 5 Hill R., 284.
[3] Elsee v. Gatward, 5 Term R., 143.
[4] Smith v. Lascelles, 2 Term R., 187.

owes the duty independent of the promise, need not be proved.[1]

So, a tenant, by virtue of his relation as such, is bound to manage a farm he occupies in a husbandlike manner.[2] And he is bound also not to do any act tending to the injury of the leased premises.

Though the bailee for work and services is not required to possess extraordinary skill, he is liable for a failure to exercise diligence in the use of such skill as he possesses. Skill being required as well as care, in the performance of the work undertaken, the bailee for hire must be supposed to have engaged himself for a due application of the necessary art; it is his own fault if he undertake a work above his strength.[3] However, where the bailor has not been deluded by any but himself, and voluntarily employs in one art a man who openly exercises another, his folly has no claim to indulgence; unless the bailee make false pretensions, or a special undertaking, no more can be demanded of him than the best of his ability. A curious case, illustrative of this distinction is cited by Sir William Jones as a specimen of Mohammedan law: "A man who had a disorder in his eyes, called on a farrier for a remedy; and he applied to them a medicine commonly used for *his* patients; the man lost his sight, and brought an action for damages; but the judge said, no action lies, for if the complainant had not been himself an ass, he would never have employed a farrier."[4] So, if a person will employ a common mat-maker to weave or embroider a fine carpet, he must impute the bad workmanship to his own folly.

If the bailee fail to perform the work he undertakes, in the course of his business, in a skillful manner, he cannot recover compensation therefor;[5] and he is moreover responsible for the value of the materials spoiled by him in the

[1] Callender v. Oelrichs, 1 Arnold R., 401.
[2] Powley v. Walker, 5 Term R., 373.
[3] Jones on Bailm., 99.
[4] Jones on Bailm., 100.
[5] Depew v. Daverell, 3 Campb. R., 451; 1 id., 38; 7 East R., 479.

work.[1] In other words, he must respond in damages to his employer to the extent of the injury he has sustained, in consequence of the non-performance of the contract of bailment.[2]

The skill demanded must be measured by the difficulty and delicacy of the work to be done, because the bailee for hire is bound to apply a degree of skill equal to his undertaking;[3] whether it be to make a pair of boots, a suit of clothes, or a telescope. Ordinary skill in the making of delicate instruments of science, music and the higher arts, may be, with reference to other branches of industry, a high order of skill; but the standard of skill exacted by the law, is that which is common and ordinary in the particular work or business undertaken.

In order to support an action for non-feasance, there must be a valid contract shown between the parties.

Where A and B were joint owners of a vessel, and A voluntarily undertook to get the vessel insured, but neglected to do so, and the vessel was lost, it was held that no action would lie against A for the non-performance of his promise, though B sustained a damage by the non-feasance, there being no consideration for the promise;[4] but a factor or commercial agent, who is entitled to a commission, will be answerable for not executing an order to insure. And so, if the party making even a gratuitous engagement, enters upon the execution of the business, and does it amiss, through the want of due care, by which damage ensues to the other party, an action will lie for this misfeasance.[5] There must be a consideration to support the contract, and an entrance upon the work is a consideration.

One who undertakes to do an act for another, without reward, is not answerable for omitting to do it; in other words, he is responsible for a misfeasance, where he attempts to do it and does it amiss, but not for a non-feasance, even though

[1] Jones on Bailm., 55.
[2] 2 Kent's Comm., 588.
[3] 1 Cowen's Trea., 70.
[4] Thorne v. Deas, 4 John. R., 84.
[5] Coggs v. Bernard, 2 Ld. Raym., 909.

special damages are averred.[1] Where he undertakes voluntarily and without reward, to do an act, not in the course of an employment which necessarily implies skill, he is required in the execution of the business only to take the same degree of care of the goods intrusted to him, as he takes of his own.[2] If, by the contract, he is to have a reward, his duty is much more strict, and he is answerable for a non-feasance, as well as for a misfeasance in its execution.[3]

A naked promise to do some act in the future, imposes upon the person making it no legal obligation; but it is valid if it be supported by a prior moral obligation; as where one owes a debt which is barred by the statute of limitations, and makes an express promise to pay it.[4] Now, however, under our recent code, such a promise to be valid, must be in writing.[5] A written promise to pay, founded on a past consideration is good, if the past services are alleged to have been done on request; and if not so laid, a request may be implied from the beneficial nature of the consideration, and the circumstances of the case.[6]

In a bailment of goods, upon which labor and services are to be performed, there is always a contract, either express or implied, to pay for the services; indeed, the receiving of the goods is a consideration for the undertaking of the bailee, and he is therefore legally bound to fulfill the terms of his agreement.[7]

Fulfillment of the contract.

The workman who receives articles to repair, or materials to manufacture, fulfills his contract by performing the work in a skillful manner, keeping the goods with ordinary care and diligence, and redelivering them to the bailor in their

[1] Elsee v. Gatward, 5 Term R., 143.
[2] Sheils v. Blackburne, 1 H. Black. R., 158.
[3] 4 John. R., 99.
[4] 5 Taunt. R., 36, 44.
[5] Code, § 110.
[6] Hicks v. Burhans, 10 John. R., 243.
[7] 2 Ld. Raym., 909.

finished condition.[1] If the materials be delivered under such an agreement as in reality amounts to a contract of sale, he becomes, as we have seen, the owner, and assumes every hazard of loss; as in the cases we have cited, where so many bushels of wheat are given for so many barrels of flour, being in reality a sale or exchange of property.[2] If the specific things delivered are not to be returned in their new and improved condition, but only things of a like kind and quality, the agreement operates as a transfer of the property; it is the contract of *mutuum*, as defined in the civil law, being an exchange of one article for another of equal value.[3]

As the title passes, the risk of loss also passes with it; and it matters not in such cases by what accident the property is destroyed, the owner is the loser. But in a bailment of goods, upon which labor and services are to be performed, the risk of loss, not covered by the undertaking of the bailee for ordinary care and diligence, remains with the bailor, who must, in case of a loss, not resulting from a want of the care and diligence exacted of the bailee, pay for the labor and services already rendered.[4] Although the rule is that the bailee is entitled to be paid for his labor, where the work is destroyed before its completion, without his fault, it seems that the usage of the particular trade, with respect to which his contract is made, will control his right of recovery.[5]

The effect of a total destruction of the articles bailed, without fault on the part of the bailee, is to put an end to the contract from that time, leaving in the bailee a right to demand compensation for his services rendered, and also for materials furnished by him in the work.[6]

There may be, without question, a special contract for the payment of the services to be performed by the bailee when the work shall be finished and redelivered;[7] and in such a

[1] 2 Kent's Comm., 588, 589.
[2] 2 Comst. R., 153.
[3] 2 Kent's Comm., 573, 574; Jones on Bailm., 64, 65.
[4] Menetone v. Athawes, 3 Burr. R., 1592.
[5] Gillet v. Mawman, 1 Taunt. R., 136.
[6] 3 Burr. R., 1592.
[7] Pierce v. Schenck, 3 Hill R., 28; id., 9.

case, as he must recover on the contract, it is difficult to perceive upon what ground he would be entitled to recover *pro tanto* for his services, the work never having been completed.[1] In a contract of this kind the parties will be presumed to have contemplated the dangers and difficulties attending its execution, as in other cases; and there being no public policy to interfere with the freedom of the parties, as there is sometimes in the case of a common carrier, there is nothing to prevent them from making their agreement for the compensation of the bailee's services to depend upon a contingency. Indeed, it has been expressly adjudged that where logs are delivered at a saw-mill under a contract with the miller that he shall saw them into boards within a specified time, and that each party shall have one-half of the boards, the transaction enures as a bailment merely, and the bailor retains his general property in the logs till all are manufactured pursuant to the contract; that the contract in such case is entire, so that the bailee acquires no interest in any of the boards manufactured until the work is finished.[2] The execution of the contract here was not interrupted by a destruction of the property; the share of the boards to be given to the bailee, was to be his compensation for the services.[3]

Mr. Justice Cowen, in the case referred to, says: "I am of opinion that when a manufacturer receives goods for the purpose of being wrought in the course of his trade, the contract is entire, and without a stipulation to the contrary, he has no right to demand payment until the work is complete. Till the labor undertaken be performed, he can claim nothing."[4]

This was said by way of argument, and the decision of the court did not involve the principle here laid down, as applicable to a case in which there was a failure on the part of the bailee through his neglect to perform the contract. But a special contract to perform a job of work for a given sum, to be paid on the delivery of the thing upon which

[1] Story on Bailm., § 426; 3 Hill R., 28. [2] Collins v. Forbes, 3 Term R., 316.
[3] 3 Hill R., 29. [4] 3 Hill R., 31.

the work is done, is a common and valid contract, necessary to be finished before a recovery can be had upon it.[1] But without such a special contract, and where there is only a general employment, as for repairing a vessel, the bailee may, as we have seen, recover for the work done, though the whole work and vessel be destroyed by an inevitable casualty.[2]

In an action for work and labor done and materials found under a general employment, the defendant may, by way of reducing the damages, show that the work was improperly done; and he may totally defeat the action by showing that it was wholly inadequate to answer the purpose for which it was done.[3] But even where there is a special contract, if the party for whom the work is done stand by and superintend its progres, or permit it to go on after the time stipulated for its completion, he will be answerable generally for the labor and services; not on the special contract, for the work has not been performed in pursuance of its terms.[4] There arises under such circumstances a new and implied promise to pay for the work, and if it be performed in the manner stipulated, except as to time, the plaintiff will be entitled to recover the stipulated compensation, unless the defendant chooses to recoupe the damages which he has sustained by the failure to complete the work within the time.[5]

Where a party enters into a special agreement, such as to log up, burn and clear, fit for sowing, ten acres of land in a good farmerlike manner, and fence it by a given day, for so much an acre, and having performed part of the work, voluntarily abandons the further performance of it, he cannot maintain an action on the implied assumpsit for the labor actually performed. The contract remaining still in force, there is no implied promise; and as the contract is

[1] Littler v. Holland, 3 Term R., 590, 592; 8 John. R., 392; 9 id., 115.

[2] 3 Burr. R., 1592.

[3] Farnsworth v. Garrard, 1 Campb. R., 38; Grant v. Button, 14 John. R., 377.

[4] Jewell v. Schroeppel, 4 Cowen R., 564; Phillips v. Butler, 8 John. R., 392; 15 John. R., 201.

[5] 4 Wend. R., 285; Ives v. Van Epps, 22 Wend. R., 155; 4 Wend. R., 483; 8 Wend. R., 109.

entire, a full performance is a condition precedent to a right of action on it.[1] Neither can a claim for such services be used as a set-off against damages recoverable for the non-performance of the residue of such work.[2] So, where one enters into a contract to work a year for another, and works ten months and a half, and then leaves, declaring that he will work no longer, he can recover nothing for the time he has worked.[3] Nor can he recover for his services rendered, where he is discharged by his employer for disobedience of his orders before the expiration of the term for which he is hired.[4]

The contract of the parties must be fulfilled according to its terms, whether it be a bailment of materials to be worked up into a building or an article of merchandise, or simply a contract for labor.[5] If the workman deviates from the contract, he cannot recover under it, even though the deviation has been by the mutual consent of both parties.[6] This is the strict rule of law; but where there has been a deviation from the contract by the consent of the employer, or in consequence of his omissions or neglect, the contractor certainly must have a right under our present system of pleadings to declare on both contracts, and recover the stipulated compensation. But it comes to the same result as formerly, when the action in such cases was brought for labor and services generally, and the special contract was introduced in evidence as the measure of damages.[7]

This could be done only where there had been a departure from or a waiver of some stipulation contained in the contract by the party entitled to insist upon it. If the special contract be still subsisting, and no act done or omitted by the one party which will authorize the other to consider the contract rescinded, the remedy must be on the special contract; and

[1] Jennings v. Camp, 13 John. R., 95.
[2] Stephens v. Beard, 4 Wend. R., 604.
[3] Lantry v. Parks, 8 Cowen R., 63.
[4] Spain v. Arnott, 2 Stark. R., 256.
[5] Ellis v. Hamlin, 3 Taunt. R., 52; 4 Cowen R., 564.
[6] 4 Cowen R., 564.
[7] Dubois v. Del. and Hudson Canal Co., 4 Wend. R., 285.

this principle is found to run through all the cases on the subject.[1] The party in default cannot enforce the contract.[2] And where there is an express contract for a stipulated amount and mode of compensation for services, the party rendering them cannot waive the contract and resort to an action on an implied assumpsit.[3]

If the party contracting to do certain work for another, who is to furnish the materials, is delayed in consequence of the neglect to provide the materials in due season, and for that reason quits the job after having done part of the work, he is confined to the contract prices, unless he shows that the work was rendered more expensive in consequence of the delay.[4] Though the action be general for work and labor done upon request, the defendant may show in evidence that the work was done under a special contract, and the prices stipulated in it will be taken as the best evidence of the value of the work.[5]

Where a carpenter agrees to build a house according to a certain plan for a specific sum, and the plan is abandoned by both parties, so that is impossible to trace the contract in the work done, the measure of compensation is the value of the work as if no contract had been entered into. And it appears that in a case like this, so far as the work is done according to the special contract, the compensation will be regulated by it.[6] For work done under a general employment, the workman is of course entitled to recover what his work is reasonably worth; and the rule is the same where there has been a deviation from the plan or specifications, by the mutual consent of the parties to the contract, with this qualification, that the special contract may be used in such a case by way of proving the actual worth or value of the work.[7]

[1] Clark v. Smith, 14 John. R., 326; Linningdale v. Livingston, 10 id., 36; Raymond v. Bearnard, 12 id. 274; 13 id., 94.

[2] Sinclair v. Bowles, 9 Barn. and Cres. R., 92.

[3] Champlin v. Butler, 18 John. R., 169.

[4] Koon v. Greenman, 7 Wend. R., 121.

[5] 7 Wend. R., 123; 4 id., 285; 1 Starkie R., 220.

[6] Hollinsead v. Mactier, 13 Wend. R., 276; Pepper v. Burland, Peake's N. P., 103.

[7] 4 Cowen R., 564.

Lien.

The workman to whom damaged articles are delivered to be repaired, or materials to be manufactured, is bound to execute his contract with fidelity and deliver up the goods intrusted to him in good order and condition to his employer; but is not obliged to deliver them until he is paid for his services; and he has a lien upon them until his services are paid for.[1] And he may vindicate his lien against creditors of the owner, as well as against the owner himself.[2] The rule is that every bailee for hire who by his labor and skill has imparted an additional value to the goods, has a lien upon the property for his reasonable charges; this includes all such manufacturers, mechanics, tradesmen and laborers as receive property for the purpose of repairing, or otherwise improving its condition.[3] But there cannot in any case be a double lien for the same work; it is confined to the party employed to do the work,[4] and as it is accessory to the right of compensation for the services, it is defeated by whatever defects that claim.

At common law there is no lien for work done or materials furnished in building a house, or other edifice, upon real estate owned by another, because it becomes immediately attached to the soil and a part of the premises; so that a conveyance of the *land* carries with it all houses and permanent buildings standing upon it.[5] But under our statutes, such a lien may be created in the cities, and several villages of the state, for the value of the labor and materials furnished and bestowed in the repair and erection of buildings, to the extent of the owner and employer's interest in the premises. In order to perfect this lien, it is necessary to follow strictly the provisions of the statute authorizing it; and

[1] Gregory v. Stryker, 2 Denio R., 628; McIntyre v. Carver, 2 Watts and Serg. R., 392.

[2] Moore v. Hitchcock, 4 Wend. R., 292.

[3] Grinnell v. Cook, 3 Hill R., 491.

[4] Hollingsworth v. Dow, 19 Pick R., 228; Eaton v. Lynde, 15 Mass. R., 242.

[5] 2 Black. Comm., 17, 18, 19; Holmes v. Tremper, 20 John. R., 29.

when perfected, it must be enforced in the manner and within the time specified, otherwise it will expire within one year thereafter.[1]

[1] 2 R. S., 645, 3 ed.

CHAPTER VII.

OF INNKEEPERS.

A PERSON who makes it his business to entertain travelers and passengers, and provide lodging and necessaries for them, their horses and attendants, is a common inkeeper; and it is no way material whether he have a sign before his door or not.[1] The keeping of an inn is not a franchise, but a lawful trade open to every citizen.[2] The business is regulated by statute, but it has been treated in this state as a franchise, only where there has been granted to the innkeeper the privilege of selling strong and spirituous liquors and wines to be drank in his house.[3] The license is required as a mode of regulating the sale of liquors to be used as a beverage, and where no such sale is intended there is no need of any license.[4] It is held that the language of our excise laws, construed one section with another, though in terms applicable to tavern-keepers and innholders in general, does not embrace so as to subject to the prescribed penalties one who keeps a tavern, but does not add to his occupation that of selling spirituous liquors.

In regard to these licenses, which are but incidentally connected with our subject, precisely as the retail of spirituous liquors is but the incident to the business of an innkeeper, it is to be noticed that they are granted by the authority of a positive law and derive their value from the fact that all other sales, less than a given quantity, are by the

[1] Bac. Abr., tit. Inns and Innkeepers, B.
[2] Overseers, &c., of Crown Point v. Warner, 3 Hill R., 150.
[3] 1 R. S., 852, 853, &c., 3d ed.
[4] 3 Hill R., 150.

same law prohibited.[1] It has been held that this prohibition, so far as it prevented the sale of liquors or wines, under a grocer's license, in quantities less than five gallons to be drank upon his premises, being an enactment contained in the Revised Statutes taking effect with them, operated with equal and binding force in chartered villages and cities as in towns, notwithstanding the city or village was, by its charter, granted before the law was passed, authorized to license the retail sale of liquor by a grocer to be drank in his house.[2] Such powers and authority, conferred upon cities and villages for purposes of local government, are not vested rights as against the state; and they may be abrogated by the legislature, as well by a general law affecting the whole state, as by a special act altering the powers of the corporation.[3] An individual corporator cannot object to a statute modifying or abrogating a power or franchise conferred upon a city or village by charter. The rights conferred upon the inhabitants and officers of a town are not so numerous and complex as those conferred upon a city or village, but they are analogous to them and of equal force and dignity, adapted to the peculiar condition and wants of the people and designed in each case to accomplish the same end, namely, the good government of the place.[4]

Each town is a body corporate, and has capacity to sue and be sued; to purchase and hold real estate; to make such contracts and hold such personal property as may be necessary to its corporate and administrative powers; and to make such order for the disposition, regulation and use of its public property as may be conducive to the interest of the inhabitants.[5] It has also large powers in respect to its municipal and domestic regulations, the same in substance

[1] 1 R. S., 854; 3 Hill R., 527. The passage of "An act for the prevention of intemperance, pauperism and crime," on the 9th day of April, 1855, has essentially abrogated former statutes on the subject; but as it must be construed with reference to the former laws, the text is left as previously written.

[2] Harrington v. Trustees of Rochester, 10 Wend. R., 547.

[3] The People v. Morris, 13 Wend. R., 325.

[4] 13 Wend. R., 330, 331.

[5] 1 R. S., 384, 385, 3d ed.

though not so diversified as those which are usually conferred on cities and villages.[1]

The excise law of this state, as hitherto established, was not a mere revenue act, but was intended to prevent evils likely to flow from an unlimited traffic in spirituous liquors; it did not in terms prohibit the sale, nor declare the act illegal; it only inflicted a penalty upon the offender; but it has been adjudged that where a statute inflicts a penalty for doing an act, though the act be not otherwise prohibited, yet the thing is unlawful; for it cannot be intended that a statute would inflict a penalty for a lawful act.[2] Hence, one who sold liquor without a license in violation of the excise law, could not recover the consideration of such unlawful sale. But, it seems, where the law requires a license for the sole purpose of raising a revenue, and only inflicts a penalty by way of securing payment of the license money, that a sale without license would be valid.[3] Not so where the law prescribing the penalty, and granting the license, looks beyond the mere question of revenue to the accomplishment of some beneficial purpose, such as the protection of the public health or morals.[4] In such cases the contract of sale is void, and no action can be maintained to recover the price of the thing sold; for the law is not so inconsistent as to enforce a contract made in violation of itself.[5] So, where a wager contract is void, because it is against principles of public policy, or in violation of a positive statute, the law will not aid either party to avoid or enforce the contract, except in the manner it points out.[6]

Whatever may be the derivation of the words, *inn* and *tavern*, they are used interchangably, as synonymous terms, in our statutes; and in the common currency of speech

[1] 1 R. S., 384–415, 851–858; 4 Denio R., 341.

[2] De Begnis v. Armisted, 10 Bing. R., 107; Griffeth v. Wells, 3 Denio R., 226.

[3] Johnson v. Hudson, 11 East. R., 180; Brown v. Duncan, 10 Barn. and Cres. R., 93.

[4] Law v. Hodgson, 2 Campb., 147; Brown v. Duncan, 10 Barn. and Cres. R., 93; Wheeler v. Russell, 17 Mass. R., 258.

[5] 3 Denio R., 226.

[6] 7 John. R., 434; 8 John. R., 147, 148.

they are certainly given and received habitually as the equivalents of each other.[1] Thompson v. Lacy was an action of trover brought against the defendant, who kept a house of public entertainment called the Globe Tavern and Coffee House in Fore-street, Moorgate, for goods detained for a tavern bill, and the defence was sustained; the court holding that a house of public entertainment in London, where beds, provisions and entertainment are furnished for all persons paying for the same, but which was merely called a tavern and coffee-house and was not frequented by stage coaches and wagons from the country, and had no stables belonging to it, is to be considered an inn; and that the owner is subject to the liabilities of innkeepers, and has a lien on the goods of his guest for the payment of his bill, even where the guest did not appear to have been a traveler, but one who had previously resided in furnished lodgings in London.[2] So, too, the keeper of an hotel, though he do not furnish stables and out-buildings for the accommodation of horses and carriages, is subject to the same liabilities as an innkeeper, but he should be declared against as an innkeeper.[3] It seems, however, that a housekeeper at a watering place, who lets lodgings and furnishes meat and drink, and provides stable room for the company that resorts there for health and pleasure, is not to be regarded as an innkeeper.[4] But it must be different where he receives them into his own house, and entertains them as guests are entertained in an ordinary hotel.

It being the established custom of an insurance company to place public inns in the class of extra hazardous buildings, the question arose in Doe v. Laming whether a policy containing the usual terms and insuring Grigsby's coffee-house as a building only ordinarily hazardous was void or valid, and Lord Ellenborough held that the coffee-house was

[1] 3 Hill R., 150. The words, *hotel* and *inn*, have nearly the same history, the meaning of which having gradually changed with the progress of society.

[2] Thompson v. Lacy, 3 Barn and Ald. R., 283.

[3] Jones v. Osborn, 2 Chitty R., 484.

[4] Parkhouse v. Foster, 5 Mod. R. 428.

not an inn within the meaning of the policy; inasmuch as there are stables and out-houses attached to an inn, to which carriages and coaches and people are coming at all hours, so as to occasion an increased danger from fire, and rank the trade of an innkeeper in the class considered doubly hazardous; whereas the trade of a coffee-house keeper is of a very different description.[1] So also, the keeper of a boarding or lodging house is not an innkeeper, and is not bound as such to receive all persons at all hours of the day and night; but he is at liberty to receive whom he pleases, and on such terms as he may prescribe.[2]

A person who makes it a business to keep a house of entertainment for travelers, and receives and entertains them, providing sheds and stables for their teams, is an innkeeper within the statute of the State of Ohio, though he keeps no liquor in his house for any purpose, and puts up no sign as such; and hence it is held that he incurs a penalty under the statute of that state for keeping a tavern without a license.[3] This decision appears to be at variance with the law, as held in this state.[4] Though the innkeeper is required by law to be regularly licensed, his liability is the same if he actually keep an inn, though he omits to obtain the license rendered necessary by statute.[5]

It is to be observed that a license to keep a tavern is a personal trust, which cannot be assigned to another; and hence one who purchases a tavern and receives from the grantor permission to sell under his license, cannot continue the business of selling and defend himself from an action to recover the penalty for selling spirituous liquors without a license, by proving such permission.[6] Under our statutes, if after the election of any person as a justice of the peace, he becomes an innholder or tavern-keeper in fact, he is thereby disqualified from commencing any new business as a justice.

[1] Doe v. Laming, 4 Campb. R., 77.
[2] Calye's Case, 8 Co. R., 32.
[3] Curtis v. State of Ohio, 5 Ham. R., 324.
[4] Overseers &c., of Crown Point v. Warner, 3 Hill R., 150.
[5] Dickerson v. Rogers, 4 Humph. R., 179 (Tenn).
[6] Alger v. Weston, 14 John R., 231.

This provision is understood to apply to cases where the tavern-keeper is licensed to retail spirituous liquors, and *becomes* so licensed after his election; for the court in construing the statute in Parmelee v. Thompson remark, that it is left "open to the people of the town, if such be their will, to have rum and justice dispensed at the same place, and by the same hand."[1]

Becoming a tavern-keeper in fact, after his election, entertaining travelers and selling them spirituous liquors, he was disqualified from trying a cause, though he was not a licensed travern-keeper, and notwithstanding the suit had been instituted before he commenced the business; a consent of the parties in such a case cannot confer jurisdiction upon the justice.[2] There is also another provision of our statutes, which deserves to be noticed, prohibiting the innholder or tavern-keeper from trusting any persons, other than those who may be lodgers in his house, or travelers not residing in the same city or town, for any sort of strong or spirituous liquors, or travern expenses, above the sum of one dollar and twenty-five cents;[3] and enacting that he shall not be capable of recovering the same in any suit, nor of receiving any valid security therefor.

Guests.

As a general rule, all persons entertained at a common inn, tavern or hotel, are to be deemed guests; but if the innkeeper invites a person to his house as a friend, he does not become answerable for his goods as an innkeeper, because he does not receive him in that capacity.[4] In one of the earlier cases, it is adjudged that if a guest leave his goods with an innkeeper, saying that he will return in three days, and before his return the goods are stolen, he cannot maintain an action for them on the custom of the realm; for at the time the goods were stolen he was not a guest; and, therefore, as

[1] Parmelee v. Thompson, 7 Hill R., 77; 2 R. S., 325, 3d ed.

[2] Clayton v. Per Dun, 13 John R., 218; Low v. Rice, 8 John R., 409; Striker v. Mott, 6 Wend. R., 465.

[3] 1 R. S., 854, 3d ed.

[4] Bac. Abr., tit. Inns and Innkeepers, C.

the innkeeper could not gain a profit, he shall not be liable to suffer loss without a special undertaking.[1] But in a still earlier case it is held that where one comes to an inn and leaves his goods and horses, and goes into the town saying that he will return at night, and afterwards returns, his goods having in the meantime been stolen, he has his remedy against the innkeeper; for the reason that he derives a profit from the keeping of the horses.[2] So, where one comes with goods to an inn, and stays there for a week, month or longer, and is there robbed of them, he has an action against the innkeeper; though perhaps, being at the end of his journey, he cannot be said to be a traveler or wayfaring man, as originally described in the writ issued in such cases.[3]

But if an attorney hires a chamber in an inn for the term of a court, he is quasi a lessee, and not a guest, and if robbed, the innkeeper is not answerable. So, if a man upon a special agreement boards or sojourns in an inn, and is robbed, the innkeeper is not liable, since he does not receive him as a guest; neither shall he be charged as an innkeeper with goods, delivered to him by his guest on another account.[4]

It appears from the original writ used against an innkeeper, which was the foundation of the common law on this subject, that the common inn was instituted for passengers and wayfaring men, being termed *diversorium*, because he who lodges there is *quasi divertens se a via*;[5] and hence a neighbor who lodges with the innkeeper as a friend, is not deemed a guest. The writ was founded on the custom of the realm, according to the tenor of which the keeper of an inn for the entertainment of travelers, was bound to take care of the goods and chattels of his guest, within his inn, without loss or damage, so that no injury should arise by any means through his default, or that of his servants.[6] The action

[1] Gelley v. Clerk, Cro. Jac., 188.

[2] Walbroke v. Griffith, Moor, 877.

[3] Bac. Abr., tit. Inns and Innkeepers, C., 5 and 6.

[4] Roll. Abr., 3

[5] Calye's Case, 8 Rep., 32.

[6] Beedle v. Morris, Cro. Jac., 224; Cross v. Andrews, Cro. Eliz., 622.

against the innkeeper, however, was not confined to the guest himself; for it is held that a master may maintain an action against an innkeeper, on the general custom, for money lost while his servant was the innkeeper's guest.[1] And so, in a recent case, it is adjudged that the owner may sue for the goods intrusted by his servant to an innkeeper, the servant being the guest;[2] and the rule is the same where the servant is robbed of his master's money, though the master be a moneyed corporation, that could not in fact be the guest of an inkeeper.[3]

The same doctrine is held in Peet v. M'Graw, which was an action of replevin for detaining a pair of sorrel horses, received by defendant to be delivered to the plaintiff; the plea of the defendant alleged that he was the keeper of a public inn, and as such innkeeper received the horses and expended money in their necessary feed and keeping, which plaintiff had omitted to tender to him; to this plea the plaintiff demurred, assigning as a cause of demurrer that it was not alleged that the person from whom the horses were received was a *traveler;* and the court held that the plea was sufficiently certain to raise the lien for keeping the horses; and that the averment that they were received by the defendant as an inkeeper was equivalent to an allegation that they were delivered to him by a traveler or guest.[4] This decision shows that the innkeeper has his lien for the keeping of a horse intrusted to him by one whom he receives and entertains as a guest; for the lien can arise only where the relation of innkeeper and guest exists, either actually or constructively.[5] Where horses were left with an innkeeper by one of his neighbors for the mere purpose of being fed and kept, the latter reserving the right of taking and using them at pleasure, it was adjudged in an action by the innkeeper for seizing and selling them on an execution against

[1] Cro. Jac., 224.
[2] Mason v. Thompson, 9 Pick. R., 280.
[3] Towson v. The Havre de Grace Bank, 6 Har. and John. R., 47.
[4] Peet v. M'Graw, 25 Wend. R., 653.
[5] 3 Hill R., 489.

the owner, that the former had no lien and could not recover.[1] This decision is placed upon the ground that the horses were not delivered to the innkeeper by a traveler or guest.

If a traveler leave his horse at an inn, and then go out to dine or lodge with a friend, he does not thereby cease to be a guest, and the rights and liabilities of the parties remain the same as though the traveler had not left the inn. And if the owner leave the inn and go to another town, intending to be absent two or three days, the same rule holds good, so far as relates to property, for the care and keeping of which the host is to receive a compensation; but it is otherwise, as we have shown, in relation to inanimate property from which the host derives no advantage, and if that be stolen during such absence of the guest, the innkeeper will not be answerble.[2] Without doubt, if the guest retain his room so as to be chargeable for it, he may be considered a guest notwithstanding his absence, even where he leaves at the inn only inanimate property.

It has been held in Massachusetts that a traveler, who lodges with a friend and sends his horse and carriage to an inn, is to be deemed a guest of the innkeeper though he never enter the house.[3] It may be questionable whether in in such a case the innkeeper is bound to receive the horse and carriage, and it is doubtful whether the mere fact of his receiving goods which he is not compelled to receive can be said to give him a lien upon them for their keeping and custody; and the lien, as we have said, arises only where there exists the relation of innkeeper and guest.[4]

The title of the guest to the property is not material; the innkeeper is bound to receive the guest, and cannot stop to inquire whether he is the right owner of the property he brings;[5] and hence he has his lien upon it, though it be in fact the property of another person wrongfully taken and left at the inn.

[1] Grinnell v. Cook, 3 Hill R., 485.

[2] Cro. Jac., 188; Yorke v. Genaugh, 2 Ld. Raym., 866; 1 Salk., 388.

[3] Mason v. Thompson, 9 Pick. R., 280.

[4] 3 Hill R., 488, 489, 490.

[5] Johnson v. Hill, 3 Stark. R., 172.

Purchasing liquor at an inn is sufficient to constitute the purchaser a guest, so as to charge the inkeeper with parcels laid down by the guest at his side while he drinks, or with an overcoat delivered to the barkeeper or hung up in the same room.[1] In Bennett v. Mellor the plaintiff's servant had taken some goods to market at Manchester, and not being able to dispose of them, went with them to the defendant's inn and asked the defendant's wife if he could leave the goods there till the following week, and she said he could not, for they were full of parcels. The plaintiff's servant then sat down in the inn, had some liquor, and put the goods on the floor immediately behind him, and when he got up, after sitting there a little while, the goods were missing. There was a verdict for the plaintiff for the value of the goods; and on a motion for a new trial, the king's bench sustained the verdict, deciding that the plaintiff's servant was to be deemed a guest of the defendant.[2] The case is cited with approbation in the supreme court of this state.[3]

If a person, after becoming a guest at an inn, as in the case just cited, go away for a brief period, leaving his property, intending to return, he is to be considered as still continuing a guest; and if his property is lost during his absence the innkeeper is liable, even where the goods are not placed in his special keeping. But the absence of the guest must be such as to show that he still remains the guest of the innkeeper, which is generally a fact to be averred, and passed upon by a jury.[4] Of course the innkeeper who receives property from any person, though not his guest, for custody, is answerable for it as an ordinary bailee; but he is under the liabilities of an inkeeper only in respect to persons whom he receives and entertains as travelers.

[1] Bennett v Mellor, 5 Term R., 273; McDonald v. Edgerton, 5 Barb. R., 560.
[2] 5 Term R., 273.
[3] Clute v. Wiggins, 14 John. R., 175.
[4] 5 Barb. R., 560; 14 John. R., 175; 2 Kent's Comm., 592, 593, 594.

What a delivery to an Innkeeper.

It is not necessary that the goods of a guest should be placed in the special keeping of the innkeeper, in order to make him liable; if the goods are placed *infra hospitium*, that is sufficient to charge him with their safe-keeping.[1] In Clute v. Wiggins, it is adjudged that innkeepers are chargeable for the goods of their guests, lost or stolen from an out-house, and that to render them liable, it is not necessary that the goods should be delivered into their special custody. In this case a sleigh loaded with wheat was put into the innkeeper's wagon-house, where it had been usual for him to receive loads of that description, and the grain was stolen during the night, the wagon-house having been broken open; and the court held the innkeeper liable.[2]

An innkeeper on a fair day, upon being asked by a traveler then driving a gig of which he was the owner, "whether he had room for the horse?" put the horse into the stable of the inn, received the traveler with some goods into the inn, and placed the gig in the open street outside of the inn yard in which he was accustomed to place the carriages of his guests on fair days; and the gig, with some goods in it, having been stolen from thence, it was adjudged that the innkeeper was answerable.[3] So, where a traveler went to an inn, and desired to have his luggage taken into the commercial room, to which he resorted and from whence it was stolen, it was held that the innkeeper was responsible, although he proved that according to the usual practice of his house the luggage would have been deposited in the guest's bed room, and not in the commercial room, if no order had been given in respect to it.[4]

The innkeeper is liable for goods and even for money deposited in his house by a guest, though not given in charge to him personally. In Kent v. Shuchard, it appeared that

[1] 5 Barb. R., 560; 5 Term R., 273.
[2] 14 John. R., 175; Calye's Case, 8 Co. R., 32.
[3] Jones v. Tyler, 1 Adolph. and Ellis R., 522.
[4] Richmond v. Smith, 8 Barn. and Cres. R., 9.

the plaintiff and his wife, with a young lady, arrived at the defendant's inn in the evening, and took a sitting room and two bedrooms, so situated that the door of the sitting room being open, a person there could see the entrances into both bedrooms: on the following day Mrs. Kent went into the bedroom and laid a reticule which contained the money on her bed, and afterwards returned into the sitting room, leaving the door open between that and the bedroom; within five minutes after, the reticule was looked for and could not be found, and the innkeeper was held liable for the money.[1] He must take care to admit no improper persons into his house, because he must answer for the property of his guest committed to his care, unless the loss of it is caused by the act of God, by the common enemy, or by the neglect or default of the guest himself.[2]

Though the innkeeper gives the key of his room to the guest, this will not of itself dispense with his own care or discharge him from his general responsibility as an innkeeper. But if the guest accepts the key and takes upon himself the care and custody of his goods, it is a question of fact for the jury to determine whether he does so with a view to relieve the innkeeper of his responsibility. Thus, an innkeeper is not answerable for the goods of his guest, which are lost through the negligence of the guest out of a room granted to him in the inn for the purpose of exhibiting his goods to his customers for sale, the key of the room being delivered to him so that he may lock the door, which he neglects to do.[3]

Notwithstanding the general rule is, that the innkeeper is liable for whatever is deposited in his house, he is not so liable where the trust is reposed in another person, such as a servant residing in the inn;[4] for in this case there is no delivery to the innkeeper. So, where a traveler arriving at an inn, placed his loaded wagon under an open shed, near

[1] 2 Barn. and Adolph. R., 803.
[2] Mason v. Thompson, 9 Pick. R., 280.
[3] Burgess v. Clements, 4 Maule and Sel. R., 306.
[4] Sneider v. Geiss, 1 Yeates R., 34.

the highway, and made no request to the innkeeper to take the custody of it, and goods were stolen from it in the night, it was held that the innkeeper was not liable for the loss, notwithstanding it was usual to put loaded wagons in that place.[1] So also, if a guest at an inn deposit his goods in a room which he uses as a shop or warehouse, and of which he has the exclusive possession, the landlord is not answerable for the goods as an innkeeper.[2] There is here something more than the mere delivery of the key to the guest, which does not discharge the landlord of his responsibility; there is, in substance, an agreement for the use of the room as a shop in which to exhibit his goods, and under this special agreement the landlord is released from his common law liability.[3]

In order to charge the innkeeper, the goods must be disposed of according to his directions and placed in the room designated by him. If a man comes to a common inn, and requires his horse to be put to pasture, which is done accordingly, and the horse is stolen, the innkeeper is not liable.[4] But where the guest gives no directions in respect to his goods or chattels and deposits them at the inn in the usual manner, the innkeeper is answerable for them;[5] and his responsibility extends equally to money, deeds, obligations and choses in action.[6] In the case of Quinton v. Courtney, a traveler who had saddle bags, in which were two hundred dollars, upon alighting at the inn, delivered the bags to a servant of the tavern-keeper, but did not inform either the servant or tavern-keeper that there was money in the bags: the bags were placed in the barroom, and were afterwards found on the lot, cut open and the money gone; and it was adjudged that the innkeeper was liable.[7] If the goods or things in action are placed within the inn, the landlord is

[1] Albin v. Presby, 8 N. Hamp. R., 408.
[2] Farnsworth v. Packwood, 1 Stark. R., 198.
[3] 4 Maule and Sel. R., 306.
[4] Calye's Case, 8 Co. R., 32.
[5] 14 John R., 175; 5 Term R., 273.
[6] Story on Bailm, § 481; 8 Co. R., 32; 2 Barn. and Adolph. R., 803.
[7] Hayw. North Car. Rep., 41.

bound to take care and answer for them, unless the guest neglects the request of the innkeeper to have the goods locked up in a particular chamber, or otherwise occasions them to be lost or stolen.[1] But it is the duty of the innkeeper to see that the goods are secured in a proper manner, and he is bound to provide honest servants and inmates, according to the confidence reposed in him by the public.[2]

Under a recent statute applicable only to hotels, the proprietors of such houses who provide a safe in the office, or other convenient place for the safe keeping of money, jewels or ornaments belonging to their guests, and post a notice to that effect in a conspicuous manner in the rooms occupied by such guests, are absolved from their liability to answer for such articles in case of loss by theft or otherwise. The effect of this statute is to make the posting of such notices actual notice to the guest that he is required to deliver his money, jewels and ornaments to the proprietor of the hotel to be deposited in the safe, if he intends to hold the landlord liable for their safety. Independent of this act, the innkeeper has the right to say to his guest that he shall deposit his valuables in the room or place pointed out for their reception; but he was required to do this in an explicit manner, so as to give the guest the opportunity of choosing whether to deliver his property to the innkeeper or to retain the custody of it himself, and assume the risk and danger of losing it. In substance, this law, which would have been more equal if it applied indiscriminately to all innkeepers, makes the guest responsible for not seeing the notice posted in his room; in other words, it demands of the guest of a hotel-keeper a greater degree of vigilance than is required of one who sojourns with an ordinary innkeeper.[3]

The hotel is only an elegant kind of common inn, and it is necessary, as we have seen, to declare against the keeper

[1] Sanders v. Spencer, Dyer, 266.

[2] Jones on Bailm., 95, 96.

[3] See chap. 421, of the New-York Session Laws of 1855, p. 774, printed in the Appendix.

of it as an innkeeper. It is in no legal sense either more or less than an inn, whatever be the name by which it is called. And hence the difficulty of construing a statute like this, in which a name of pretense is used to designate a favored class.[1]

Responsibility of Innkeepers.

We have already mentioned incidentally that the innkeeper is presumptively chargeable for the loss of the goods of his guest committed to his care, unless the loss is caused by the act of God, by the common enemy, or by the neglect or default of the guest.[2] It is not necessary, where the goods are proved to be lost, to prove negligence in the innkeeper, to make him liable for the loss.[3] In Hill v. Owen, the plaintiff having introduced testimony tending to prove that the horse in question was delivered to the defendant, as an innkeeper, apparently in a healthy condition, in the evening, and that he was found dead in the defendant's stable on the next morning, the court instructed the jury that the delivery of the horse to the defendant and the death of the animal before redelivery to the guest were prima facie evidence of negligence in the innkeeper, and that it was incumbent on the latter to save himself from responsibility for the loss sustained by the plaintiff, to show that the horse had been properly attended to.[4]

The rule establishing the innkeeper's liability is very strict, and where a loss is shown the presumption of law is, that it has been caused by the landlord's neglect.[5] The

[1] Every hotel is an inn; but not every inn is a hotel; but who is to draw the line between the old fashioned tavern or inn and these new favorites of the law, and decide just when the inn emerges into the more showey hotel? Whether its name makes the transformation, or the size and sumptuousness of the edifice and furniture? Statutes are to be construed so as to give to the language used its plain and ordinary meaning. But the terms used in this act are not sufficiently definite, *hotels* being only a single class of houses appropriated to the same business, differing from others in no marked and essential features.

[2] Mason v. Thompson, 9 Pick. R., 280.

[3] 5 Barb. R., 564.

[4] 5 Blackf. R., 323.

[5] Calye's case, 8 Co. R., 32; Bennett v. Meller, 5 Term. R., 273; 14 John. R., 177.

reason of this rule is stated very strongly by the English writer so often quoted on the law of bailments. "Rigorous as this rule may seem, and hard as it may actually be in one or two particular instances, it is founded on the great principle of public utility to which all private considerations ought to yield. For travelers, who must be numerous in a rich and commercial country, are obliged to rely almost implicitly on the good faith of innholders, whose education and morals are none of the best, and who might have frequent opportunities of associating with ruffians and pilferers, while the injured guest would seldon or never obtain legal proof of such combinations, or even of their negligence, if no actual fraud had been committed by them."[1] The common law, it is to be considered, grew up in a period when roberries were frequent and highwaymen often mingled with travelers and stopped at the same taverns, sometimes making the common inn a place of rendezvous. But though the character of innkeepers, like that of the great body of the people, has been greatly improved since the rule was established fixing the liability of landlords, it is still founded in a sound public policy. Being generally a stranger, the traveler has not the means of proving how his property has been injured or lost, and hence the propriety and justice of the legal presumption, which in the first instance holds the innkeeper responsible for whatever property is intrusted to him in that capacity.[2]

The principle is analogous to that which regulates the liability of the common carrier and holds him answerable for all the goods he receives, and it is supported by the same reason of public utility.[3] By the custom of the realm, that is the general custom, innkeepers are obliged to keep the goods and chattels of their guests which are within their inns, without substraction or loss day and night, so that no damage shall come to them from the negligence of the inn-

[1] Jones on Bailm., 95, 96.

[2] 5 Term. R., 276; 5 Blackf. R., 323.

[3] Orange County Bank v. Brown, 9 Wend., R., 114.

keeper or his servants.[1] But the innkeper is not liable where the loss of the goods does not occur through his fault; if shown to be deposited in his inn, and there lost or injured, the prima facie presumption is that the loss or damage was occasioned by the neglience of the innkeeper or his servants. But this presumption may be rebutted, and if the jury find in favor of the innkeeper, as to negligence, he is entitled to succeed on a plea of not guilty.[2]

The innkeeper, however, is liable in many cases where he is guilty of no actual neglect; and some of the cases go so far as to assume that he is liable at all events for goods intrusted to him as an innkeeper, unless the loss of them is shown to have been caused by the act of God, by the public enemy or by the neglect or default of the guest.[3] In this state it has been adjudged that he is liable for a load of wheat deposited in his wagon house and stolen from thence during the night.[4] He must answer for the goods received by him if they are lost, though it does not appear how the loss occurred.[5] But the action against him in such a case must be in the nature of case founded upon the custom, alleging the delivery of the goods to him as an innkeeper and their loss through his neglect.[6]

In Piper v. Many it is held that an innkeeper is responsible for the safe keeping of a load of goods belonging to a traveler who stops at his inn for the night, if the carriage containing the goods be deposited in a place designated by the servant of the innkeeper, although such place be an open unenclosed space near the public highway.[7] Where the goods have been received into the care and keeping of the innkeeper, within the meaning of the terms of his common law liability, that is *infra hospitium*, he is bound to keep them in safety; and if they are stolen, he cannot free him-

[1] 5 Adolph. and Ellis, N. R., 164; Story on Bailm., § 470.
[2] Dawson v. Chamney, 5 Adolph. and Ellis, N. R., 164.
[3] Mason v. Thompson, 9 Pick. R., 280.
[4] Clute v. Wiggins, 14 John. R., 175.
[5] Hallenbake v. Fish, 8 Wend. R., 547; 9 Pick. R., 280.
[6] 8 Wend. R., 547; 4 id. 613; 25 id. 653.
[7] 21 Wend. R., 282.

self from liability by showing that he has not been guilty of negligence.[1] It matters not where the goods are deposited, provided they are placed in the custody of the innkeeper; if he wishes to exonerate himself, unless the goods are deposited in a particular place, or kept in a speciel manner, he must say so.[2]

The liability of the innkeeper is strict, and doubtless often severe, but not more so than that of the common carrier, since both are considered insurers of the goods while in their keeping.[3] If the guest deliver his horse to the hostler, and request that he be put to pasture, which is accordingly done, and the horse is stolen, the innholder is not responsible; for he is not to be regarded as an insurer of goods which are not *infra hospitium*, that is, neither in the inn nor within the curtilage.[4]

A drover stops at a common inn with a drove of sheep, which, with his knowledge are turned out to pasture; in the pasture, or in the gulf adjoining it, there is growing a poisonous weed, called laurel; on the next day several of the sheep die, and others sicken, so that the drover is obliged to lie by for several days with his flock and servants; and from the evidence produced on the trial, it is manifest that the sheep have eaten laurel, and that the flock is greatly injured; upon these facts the law does not hold the innkeeper liable as such, though he may be, like any other bailee, liable for negligence.[5]

It was till very recently considered still a debatable question, whether common carriers and innkeepers can contract for a more restricted liability than the law imposes upon them in the absence of a special agreement; but the current of authorities tends to the conclusion that they may.[6] They certainly may make rules regulating the manner in which

[1] 21 Wend. R., 283.
[2] 4 Maule. and Sel. R., 306; 8 Barn. and Cres. R., 9.
[3] 21 Wend. R., 285.
[4] Calye's Case, 8 Co. R., 32.
[5] Hawley v. Smith, 25, Wend. R., 642.
[6] Alexander v. Greene, 3 Hill R., 9; Wells v. The Steam Nav. Co., 2 Comst. R., 209; Gould v. Hill, 2 Hill R., 623; Dorr v. N. J. Steam Nav. Co., 4 Sand. R, 136.

they will accept goods; such as requiring that the contents of packages delivered to the carrier shall be made known, and that goods delivered to the inkeeper shall be deposited in a particular room.[1] This is no more than saying that the guest may take upon himself the care and custody of his goods, so as to relieve the innkeeper from his responsibility; and that the person who delivers property to a carrier is bound to deal fairly, and state frankly the contents of packages to be carried. If he delivers to the carrier a package of money, and takes a receipt for it as containing two hundred pounds, when it in fact contains four hundred, and the package is lost, he shall recover only that for which he pays.[2]

It is in this state settled that a common carrier may, by an express special contract, limit or restrict his common law liability as an insurer for the safe transportation and delivery of goods intrusted to him, while public policy forbids that he should be permitted to exonerate himself, even by an express contract, from a loss occasioned by his default or neglect of duty. The effect of this doctrine is to permit the parties to the contract for the carriage of goods, to separate the business of insuring the goods, from the undertaking to carry them; and clearly permits a very essential modification of the carrier's responsibility.[3]

There are dicta to the effect that the innkeeper is liable for any loss not occasioned by the act of God or the king's enemies; and Chancellor Kent says he is held responsible to as strict and severe an extent as common carriers,[4] but he afterwards remarks that he is not answerable for a loss occasioned by superior force, such as robbery.[5] In England, where chattels have been deposited in a public inn, and

[1] 4 Burr., 2301; 9 Wend. R., 85; Richmond v. Smith, 8 Barn. and Cres. R., 9; Burgess v. Clements, 4 Maule and Sel. R., 306.

[2] 4 Burr., 2301; 9 Wend. R., 85.

[3] 4 Sand. R., 136; but see Gould v. Hill, 2 Hill R., 623. This case is overruled by the court of appeals; see 1 Kernan R., 485.

[4] 2 Kent's Comm., 592; Richmond v. Smith, 8 Barn. and Cres. R., 9.

[5] Calye's Case, 8 Co. R., 32; 2 Kent's Comm., 593; Kent v. Shukard, 2 Barn. and Adolph. R., 803.

there lost or injured, though the presumption is that the loss or damage was occasioned by the negligence of the innkeeper or his servants, this presumption may be rebutted by proof of due care, and the finding of the jury on that question will be conclusive.[1] With us, the extent of the innkeeper's liability does not seem to be precisely defined; he is answerable in the first instance, though no neglect whatever is proved;[2] he is responsible for goods stolen from his custody, or lost while in his custody;[3] and he must respond for the damages where a guest in his house is robbed of money or goods.[4]

The responsibility of the innkeeper begins from the moment he receives the guest with his goods, and it ends when the relation between him and the guest is dissolved. The privileges and responsibilities of the innholder are reciprocal and dependent upon each other, as a duty upon a right.[5] For his liability he has a lien on the goods intrusted to him. Where he has no lien, he is not liable as an innkeeper; and he has a lien only where property has been delivered to him by a traveler or guest.[6] If property come into his hands in any other manner, as a stray, for example, he has no lien upon it for keeping.[7] If left behind by one who has been his guest, the lien attaches, though the guest did not own the property.[8] When the guest pays his bill and leaves the house with the intention of not returning, thus terminating his relation as a guest, the innkeeper's liability ceases; and after this he is responsible only as an ordinary bailee for baggage left behind.[9]

It follows from what has been said, that if an inkeeper's servants rob his guests, the master is bound to make resti-

[1] Dawson v. Chamney, 5 Adolph. and Ellis, N. R., 164.
[2] 5 Blackf. R., 323.
[3] 14 John. R., 175; 9 Pick. R., 280.
[4] 6 Har. and John. R., 47.
[5] 3 Hill R., 490, 491.
[6] 25 Wend. R., 653.
[7] Fox v. McGregor, 11 Barb. R., 41.
[8] Johnson v. Hill, 3 Stark. R., 172.
[9] Wintermute v. Clark, 5 Sand. R., 242.

tution; indeed, it has long been established law, that the inkeeper is bound to make restitution if the guest is robbed in his house by any person whatever, unless it should appear that he was robbed by his own servant, or by a companion whom he brought with him.[1] This rule is somewhat more rigid than that enforced under the Roman law and in those countries whose jurisprudence is founded on the civil code; but is much more convenient and easier of execution, since it imposes the burden of proof upon the party whose duty it is to guard and keep the property. If the loss be caused by irresistible force or by inevitable accident, or by a public enemy or by the neglect or default of the guest himself, the innkeeper is not answerable; for the reason that the law requires of him no impossibility.[2]

Innkeeper's duty to receive Guests.

The keeper of a common inn is not at liberty to refuse to receive a guest, for whom he has room, either in the day time or at night; neither can he discharge himself from his legal responsibility by a refusal to take care of his goods on the ground that there are suspected persons in the house for whose conduct he is not willing to be answerable.[3] If, having room for him, he refuses to receive a guest, without a reasonable ground for his refusal, or on a false pretence that his house is full, he will be liable to an action, both civilly and criminally.[4] An indictment lies against an innkeeper, who, having room in his house at the time, refuses to receive a traveler; and it is not necessary for the traveler to tender the price of his entertainment if his rejection is not placed on that ground. And it is no defence for the innkeeper that the guest was traveling on a Sunday, or at an hour of the night after the landlord had gone to bed; nor is it any defence that the guest refused to tell his name

[1] 1 Black. Com., 430; 8 Co. R., 33; Jones on Bailm., 94.
[2] Jones on Bailm., 96, 104.
[3] Jones on Bailm., 94.
[4] Dyer, 158, b 1; Rex v. Ivens, 7 Carr. and Payne R., 213.

and abode, since the innkeeper has no right to insist upon knowing these particulars; but if the guest come in drunk, or behaves in an indecent or improper manner, the innkeeper is not bound to receive him.[1]

The innkeeper does not undertake absolutely to receive as guests all persons who come to his house, but only those who are capable of paying a compensation suitable to the accommodations provided.[2] He has a right to demand prepayment;[3] but if he hangs out a sign and opens his house for travelers, it is an implied engagement to entertain, on the same terms, all persons who travel that way; and upon this universal assumpsit an action on the case will lie against him for damages, if he without good reason refuses to admit a traveler.[4] The putting up of a sign is only a matter of evidence, and by no means necessary to prove that a house or hotel is really a common inn.[5]

In a private action against an innkeeper for refusing a traveler lodgings for the night, it seems a tender should be alleged to have been made of compensation for the entertainment.[6] If he puts himself upon his legal rights, he should take from the landlord every excuse for not receiving him; and it seems also that a prosecution against him by indictment at common law must be supported by a similar allegation.[7] But an indictment for not receiving a guest has been sustained where no tender of compensation was actually made.[8] In one of the early authorities, the rule is laid down in these words: "If one who keeps a common inn refuse either to receive a traveler as a guest into his house or to find him victuals or lodging, upon his tendering him a reasonable price for the same, he is not only liable to render damages to the party grieved in an action on the case,

[1] 7 Carr. and Payne R., 213.
[2] Thompson v. Lacy, 3 Barn. and Ald. R., 285.
[3] 9 Rep., 87.
[4] 3 Black. Com., 166.
[5] 5 Sand. R., 242; 3 Hill R., 150.
[6] Fell v. Knight, 8 Mees. and Welsb. R., 269.
[7] 8 Mees. and Welsb. R., 269.
[8] 7 Carr. and Payne, R., 213.

but may also be indicted and fined at the suit of the king, and it is no way material whether he have a sign before his door or not, if he make it his business to entertain passengers."[1] So, the keeper of a common inn may be indicted at common law and fined as being guilty of a public nuisance, if he usually harbor thieves or persons of a scandalous reputation, or suffer frequent disorders in his house, or take exorbitant prices.[2]

Although a traveler is entitled to reasonable accommodations in an inn, he is not entitled to select a particular apartment, or to insist on occupying a bedroom for the purpose of sitting up all night, so long as the innkeeper is willing and offers to furnish him with a proper room for that purpose.[3]

Where an innkeeper, in a town through which lines of stages pass, and at whose inn the stages stop, permits the drivers of some of the lines to resort to his house without objection, he connot exclude the driver of a rival line from entering his inn and going into the common public rooms where travelers are usuallay placed, for the purpose of soliciting passengers for his coach, provided there is reasonable expectation that passengers are there and he comes at a suitable time, conducts with propriety, and is doing no injury to the innkeeper.[4] A house of public resort, whether licensed or not, is a tavern, and of course open to the public.[5] But an innkeeper is not bound for that, or any other reason, to entertain an agent of a rival inn, who seeks to decoy away his customers.[6] Nor is he compelled to receive a driver of a rival line of stages into his house, if he behave so as to create a disturbance, or otherwise interrupt the quiet of his house; indeed, it is his duty to keep an orderly house.[7]

[1] 2 Hawkin's Pleas of the Crown, 267.

[2] 2 Hawkin's Pleas of the Crown, 267.

[3] Fell v. Knight, 8 Mees. and Welsb. R., 269.

[4] Markham v. Brown, 8 N. Hamp, R., 523.

[5] Linkous v. Commonwealth, 9 Leigh. R., 608. Shall I not take mine ease in mine inn?

[6] Jencks v. Coleman, 2 Sumner, 221.

[7] 8 N. Hamp. R., 523; 2 Hawk., P. of the C., 267.

Innkeeper's lien.

The law gives to the innkeeper a lien on the goods of his guest intrusted to him, for his reasonable charges. He is bound to receive and entertain travelers, and is answerable for the goods of the guest although they may be stolen or otherwise lost without any fault on his part; like a common carrier, he is an insurer of the property, and presumptively nothing but the act of God or public enemies will excuse a loss. On account of this extraordinary liability the law gives the innkeeper a lien on the goods of the guest for the satisfaction of his reasonable charges. It was once held that he might detain the person of the guest, but that doctrine is now exploded, and the lien is confined to the goods.[1]

He has his lien where he is liable as an innkeeper, and he is so liable only for goods intrusted to him by his guest.[2] Accordingly he has no lien for the keeping of horses, received by him from one of his neighbors, who reserves the right of taking and using them at pleasure.[3] It is essential to the lien that the goods should be received from one who is either actually or constructively the guest of the innkeper. There must be such a relation; but it is not necessary to its existence that the owner of the goods should be actually *infra hospitium* at the time the loss happened or the lien accrued. For example, if a traveler leave his horse at the inn, and then go out to dine or lodge with a friend, he does not thereby cease to be a guest, and the rights and liabilities of the parties remain the same as though the traveler had not left the inn.[4]

Mr. Justice Bronson, in delivering the opinion of the court in Grinnell v. Cook, observes: "If one send his horse or his trunk in advance to the inn, saying he will soon be there himself, it may be that he should be deemed a guest from the time the property is taken in charge by the host. But when, as in Mason v. Thompson, the owner has never been

[1] Grinnell v. Cook, 3 Hill R., 488; per Mr. J. Bronson.
[2] Peet v. McGraw, 25 Wend. R., 653; 14 John. R., 175.
[3] 3 Hill R., 485.
[4] Id. 489; 9 Pick. R., 280; 2 Ld. Raym., 866.

at the inn, and never intends to go there as a guest, it seems to me little short of downright absurdity to say, that in legal contemplation he is a guest." But it is agreed that if the traveler stop at the inn, and leave his horse and carriage there, and then go directly to lodge at the house of a friend, he is to be deemed a guest of the inkeeper;[1] and the difference between this case and that of Mason v. Thompson is merely a matter of form;[2] there is none in substance. It can make no material difference whether the traveler personally leaves his horse at the inn, or sends it there by a servant.

If goods be left with an innkeeper by one who is no guest or traveler, and they are lost, he shall not answer for them because he has no benefit from the keeping, and it is not his employment to keep such; here of course he has no lien; but if a horse be left at his stable, and he is lost, he shall answer for it because he receives profit thereby, arising from the meat consumed by the horse; and for this reason he has a lien for his keeping.[3] As the property must be received by the innkeeper from a traveler or guest, in order to create either the lien or liability;[4] it is essential in order to charge the innkeeper that the complaint should show that the loss occurred while the owner or person in charge of the property remained his guest. The lien, however, may remain after the guest has departed, provided he leaves his goods behind without paying his bill.[5]

Though the innkeeper has a right to detain the horse of his guest for the expenses of his keeping, if by suffering the horse to depart, or by any other means, he gives credit to the owner, he cannot afterwards detain him upon his coming again into his possession. In an action of trover brought by the guest against his landlord for detaining and converting plaintiff's horse to his own use, the plea alleged that plaintiff owed defendant so much money for horse meat at several

[1] Yorke v. Grenaugh, 2 Ld. Raym., 688; 1 Salk., 388.
[2] 9 Pick. R., 280.
[3] Lane v. Sir Robert Cotton, 12 Mod. R., 480.
[4] 6 Har. and John. R., 47.
[5] 3 Hill R., 485.

times, and claimed a lien therefor on the horse; on a demurrer to this plea, it was held that though the innkeeper may detain the horse for his meat for one night, he cannot afterwards revive a lien which has been once surrendered, nor can he sell the horse and pay himself.[1]

The innkeeper has, as we have said, a lien on the horse of his guest, although the animal was brought to the inn by one who took him wrongfully, provided the innkeeper have no notice of the wrong and act honestly.[2] His lien on the goods of his guest covers the general expenses of his living, including board, lodging and wine supplied to the guest on his order, whatever be the amount, if the guest is possessed of his reason and be not an infant.[3]

If, in such a case, the sheriff levy upon the guest's goods, he takes them subject to the innkeeper's lien for his whole bill, and not merely for his lodging, board and a reasonable quantity of wine. The lien attaches only upon the goods that have been delivered into the custody of the innkeeper and for which he is responsible in case of a loss; for the innkeeper cannot detain the person of his guest, nor take from him a parcel without his consent, nor can he take off from him his coat in order to secure payment of his bill.[4]

It seems that where a guest brings several horses to an inn, and afterwards takes them all away but one, the lien for the keeping of those taken away does not attach upon the one left behind; but the innkeeper has a right to detain him for his own keeping.[5] By parting with the possession, the innkeeper puts an end to his lien, for if the owner gets the property into his hands without fraud, the lien is at an end, and it will not be revived by the return of the goods.[6]

[1] Jones v. Thurloe, 8 Mod. R., 172.

[2] Johnson v. Hill, 3 Stark. R., 172.

[3] Proctor v. Nicholson, 7 Carr. and Payne R., 67. The landlord has a lien for money loaned to his guest on an agreement that his goods shall be a security for the loan.

[4] Sunbolf v. Alford, 3 Mees. and Welsb. R., 248.

[5] 7 Bulst., 207, 217.

[6] Bevan v. Waters, 3 Carr. and Payne R., 520; Jones v Thurloe, 8 Mod. R., 172; Jones v. Pearle, 1 Str., 556; Sweet v. Pym, 1 East. R., 4; 5 Mees. and Welsb., 342.

The inkeeper's lien upon the goods of his guest does not clothe him with the right to sell them for the satisfaction of his charges; his remedy to enforce the lien is by an action in the nature of a bill in equity.[1] Within the city of London he has such a right to sell by special custon, but he has no such right by the general custom which is the common law of the realm. Chancellor Kent suggests that it would be very convenient to allow the innkeeper to sell the chattel on which he has a lien, without suit, in like manner as a pawnee may do, on a reasonable notice to redeem; since the expense of a suit would, in most cases, more than exhaust the value of the pledge.

Statute Regulations.

There is in Holinshead's Chronicles a description of the inns of England, copied in the appendix, from which it will be easy to perceive the reason of the law establishing the duties and responsibilities of the innkeeper. The habits and morals of a people are always important to be considered in the study of a law of this kind confessedly based upon public policy, and designed for the benefit and convenience of the community. The effect of the rule, holding the good-man of the house responsible for all losses occurring in his inn, is such that even in a house frequented by robbers, and served by thieves, the chronicler tells us you shall not hear that a man has been robbed in an inn. Though entirely unintentional, this is very high testimony to the wisdom of the law, showing at once its general utility and the circumstances in which it originated.[2]

It is agreed that at common law the keeping of an inn is no franchise, but a lawful trade, open to every citizen, and for which he needs no license; that where it is kept in a disorderly manner, the keeper may be indicted and fined, as being guilty of a public nuisance; and that he may be dealt

[1] Fox v. McGregor, 11 Barb. R., 41; 1 Str., 556; Pothonier v. Dawson, 1 Holt, N. P., 383; 2 Kent's Comm., 642; 8 Mod. R., 172.

[2] See note in the appendix.

with in like manner if he usually harbors thieves or persons of scandalous reputation.[1]

The license system is a creation of the statute, which in the beginning extended to common inns only where these, by being made the scene of disorderly tippling, were considered as having degenerated into ale-houses.[2] Hence it is said that every inn is not an ale-house, nor every ale-house an inn; but if an inn uses common selling of ale, it is then an ale-house; and if an ale-house lodges and entertains travelers, it is also an inn.[3] The license was required, as a means of revenue, in order to place ale-houses under good police regulations, and to prevent them from multiplying to an unreasonable number. When the inn became an ale-house, it came under the law requiring a license. Our statute, regulating this matter of excise, is in many particulars the same as those of England.[4] In the reign of George II., a statute was passed enacting that no license should be granted to any person not licensed the year previous, unless such person should produce to the justice a certificate under the hands of the parson, vicar or curate and the major part of the church-wardens and overseers, or else three or four reputable and substantial householders and inhabitants of the parish or place where such ale-house was to be situated, setting forth that such person was of good fame and of sober life and conversation.[5] Our statute demands no certificate, but it requires that the applicant for a license shall be of good moral character.

Under our Revised Statutes, every keeper of a public inn or tavern, except in the city of New-York, is required to keep at least two spare beds for guests, well provided, and good and sufficient stabling, grain, hay or pasturage for horses and other cattle, for the accommodation of travelers.[6] Every innholder or tavern-keeper, who is licensed as such,

[1] Bac. Abr., Inns and Innkeepers, A.
[2] Salk., 45; Hutton, 99; 5 and 6 E., 6 c., 25; 4 Mod. R., 144, and Bac. Abr.
[3] 3 Hill R., 157.
[4] 1 R. S., 853, 3 ed.
[5] 26 Geo. II., c. 31, f. 2.
[6] 1 R. S., 853, 3d ed, § 10.

is also required to put and keep up a proper sign on or adjacent to the front of his house, with his name thereon, indicating that he keeps a tavern;[1] and under the same statutes he might be licensed as a tavern keeper without a permission to sell strong or spirituous liquors, or wines or alcoholic drinks; but before any applicant could be licensed, he was required to execute a bond to the people of this state, with a surety to be approved by the commissioners of excise, with a condition that such applicant, during the time he should keep an inn or tavern, would not suffer it to be disorderly, nor suffer any cock-fighting, gaming or playing with cards or dice, nor keep any billiard table or other gaming table within the tavern so kept by him, or in any out-house or yard belonging thereto.[2] No person not licensed to keep a tavern, could put up a sign indicating that he kept a tavern.[3] But a license was not necessary in this state to authorize the business of keeping a tavern, neither were the responsibilities of an innkeeper affected in the slightest degree by his obtaining or omitting to obtain a license.[4]

There is a species of inconsistency between the recognized and well established principle of common law, that the business of innkeeping is not a franchise, and that provision of the statute enacting that no person who has not at the time a license to keep a tavern, shall put up a sign indicating that he keeps one. If the intention of the act of 1843 be to prevent the keeping of any inn, which is not licensed, it is a little remarkable that it should have only prohibited the erection of a sign; that is to say, imposed a penalty upon the citizen for employing the usual and ordinary evidence, or advertisement, of the business which he carries on under the authority of the law.[5]

[1] Id., § 11.

[2] 1 R. S., 853, 3d ed.

[3] Id., 853, 4; Session Laws of 1843.

[4] 3 Hill R., 150; Dickerson v. Rodgers, 4 Humph. R., 179; 5 Ham. R., 324

[5] Session Laws of 1843, and the Overseers, &c., of Crown Point v. Warner, 3 Hill R., 150; 1 R. S., 853, 854, 3d ed. Hotels and inns have a parallel history;

By the recent prohibitory statute, the previous system of excise and license, as it existed in this state, is extensively and materially modified; so that the retail sale of intoxicating liquors can no longer be carried on as heretofore. By the second section of the act, it is impliedly enacted that no person who is the keeper of, or interested in any boarding or victualing-house, grocery or fruit store, or any barroom, confectionary, inn, tavern, or other place of public entertainment; or who is the keeper of, or interested in any museum, theatre or other place of public amusement, or the captain of, or an agent or servant on board of any vessel or water craft of any kind, shall keep for sale or sell intoxicating liquor and alcohol. The first section contains a general prohibition of the sale by any person in any place whatsoever; enacting that intoxicating liquor shall not be given away or kept for that purpose any where except in a dwelling-house in which there is no store, tavern, grocery, shop, boarding or victualing-house, or room for gambling, dancing or other public amusement or recreation; with this exception, that the first section does not apply to liquor, the right to sell which in this state is given by any law or treaty of the United States.

in France the hotel was at an early day the palace or dwelling-house of a prince or lord, in which he was accustomed to entertain travelers and strangers; and the inn in England seems to have been originally the town-house of a nobleman, bishop or other distinguished personage, in which he resided and entertained his followers, when he attended court; thus Warwick, the king-maker, whilst he resided in London, a city which he loved and courted, kept open house for the humbler sort of people, and free board for all comers, roasting six oxen for every meal, so that each guest might carry off as much meat with him as he could stick upon a large dagger; and such was his hospitality, that it was a saying current in his time, that thirty thousand men were fed by him on his various domains and in his numerous castles. As the commons grew in importance, common inns took the place of ducal and baronial halls, till by degrees the hospitable monastery and the castle of the nobleman were no longer frequented by the traveler, as a place of entertainment and rest on his journey; so that finally the old hospitality was superceded by the age of commerce and civil freedom. Gray's inn and Lincoln's inn, designating, it is said, the residence of the families whose names they bear, are still left as a kind of fossil history of the old time, and origin of our public houses. (2 Michelet's History of France, 319; Webster's Dictionary.)

Other citizens of good moral character except those above mentioned, being electors of the town or city where they intend to carry on the business, may sell intoxicating liquor and alcohol for mechanical, chemical or medicinal purposes, and wine for sacramental use, in the manner prescribed, and on complying with the terms and requirements of the act. Before entering upon the business and within one year previous, the person intending to sell is required to file in the office of the clerk of the county, an undertaking executed by himself and two good and sufficient sureties, to be approved by the county judge, and duly acknowledged before the judge, that he will not violate any provision of the act, and will pay all fines, damages and costs which may be imposed upon or recovered against him, civilly or criminally under the provisions of the act. This undertaking, which must be annually renewed and filed, must be accompanied by an oath or affirmation taken before such judge, setting forth the town or ward, and particularly designating and describing the premises and place in which he intends to sell such liquor, and declaring that he is an elector of such town or ward, and does not use intoxicating liquor as a beverage; and is not, and during the time he shall sell such liquor, will not be a peddler, nor the keeper of, nor interested in any inn, tavern, boarding-house, victualing-house, grocery or fruit store, barroom, confectionary or other place of public entertainment; nor the keeper of, nor interested in any theatre, museum, or other place of public amusement, or the captain, commander, agent, clerk or servant of, or on any vessel, boat or water-craft of any kind whatever, and will not violate any provision of the act.

The undertaking required cannot be approved unless the applicant is a man of good moral character, and his sureties, house-holders within the county; and shall severally justify in the sum of five hundred dollars each, over and above all debts, demands, liabilities or legal exemptions, and shall also make oath or affirmation that they have not become possessed of any property for the purpose of enabling them to justify as such sureties, and that they are not and will not

become directly or indirectly engaged or interested in the manufacture or sale of intoxicating liquor during the continuance of their suretyship.

No person is permitted to sell any liquor known by him to be impure or adulterated; nor is any person permitted to sell or suffer any liquor to be sold to be drank upon the premises where it is sold; to minors, or to any one who is not of good character for sobriety, or in any other manner than that prescribed in the act.

The minor provisions and details of this statute, framed to facilitate its execution, are not important to be noticed in this connection. It is a stringent law, prescribing severe penalties for its violation, authorizing a search for and seizure of intoxicating liquors kept in violation of its provisions, and totally prohibiting innholders and tavern-keepers from either keeping or selling or giving away liquors of any kind. In the absence of judicial construction, it is not possible to express any other than a private opinion as to the scope and intent of its several and various requirements.[1]

What will excuse the Innkeeper.

The duty of the innkeeper being enjoined by law, he cannot discharge himself from it under pretence of sickness, want of understanding or absence; if he be so distempered that he is not of sound memory, and a guest knowing thereof inns there, where his goods are stolen, an action lies against the innkeeper, for he cannot disable himself by saying he was not then of a sound memory.[2] But an infant inkeeper is not liable, since he cannot be charged on either an express

[1] See "An Act for the Prevention of Intemperance, Pauperism and Crime," passed April 9, 1855. Session Laws of that year, ch. 231, p. 340.

Nearly all the states of the Union, have regulated the sale of intoxicating liquors, prohibiting the sale otherwise than as prescribed by statute. In several of the states the sale of liquor as a beverage, in small quantities, to be drank on the premises where it is sold, has been totally prohibited. Till quite recently, the excise laws of this state may be regarded as a fair sample of the rest. The system was introduced in England in its elementary state as early as the passage of the Magna Charta (*Jeremy's Law of Car.*, 139).

[2] Cro. Eliz., 622. This is the old rule; it is perhaps somewhat modified by recent decisions.

or implied contract.[1] If an innkeeper goes abroad, or is absent, he must answer for the goods of his guest just the same; for it is his duty to employ faithful and efficient servants to take care of them in his absence.[2] It is said that an innkeeper, or a person keeping a livery-stable, is obliged to receive a horse, though the owner does not lodge in his house; for by taking upon him a public employment he is obliged to serve the public as far as his employment extends.[3]

In respect to the livery-stable keeper, who has no lien except by a special contract to that effect, it is clear that he cannot be compelled to receive a horse for keeping.[4] But the innkeeper stands in a different attitude towards the public, and it seems that he is bound to receive a horse and carriage for keeping, though the owner does not lodge with him; that he has a lien for the keeping, and is answerable as an innkeeper for the loss of such property.[5] This, however, is with us a mooted point; though it is conceded that he has a lien where he is bound to receive the property.[6]

Though the innholder be not paid in money for receiving and securing the traveler's trunk, yet the guest *facit ut faciat*, and alights at the inn, not solely for his own refreshment, but also that his goods may be safe; the custody of the goods is to be considered as accessary to the principal contract, and the money paid for the apartments as extending to the care of the baggage.[7] Where a person comes to an inn, and desires to be entertained, and the innkeeper refuses because his house is already full, and the traveler nevertheless insists upon entering, saying that he will shift among the rest of the guests, and accordingly places his baggage in the chamber without the keeper's consent, where he is robbed, he does not in fact become a guest.[8] So, if the host require his guest

[1] Roll. Abr., tit. Infancy and Age.
[2] Roll. Abr., 4.
[3] Bac. Abr., 664; Francis v. Wyatt, 3 Burr., 1498.
[4] 1 Carr. and Payne R., 575; 3 id., 520; 1 Cromp. and Mees. R., 743.
[5] 1 Salk., 388; 9 Pick. R., 280.
[6] 3 Hill R., 485.
[7] Jones on Bailm., 94; Lane v. Sir Robert Cotton, 12 Mod. R., 480.
[8] Dyer, 158.

to have his goods placed in a particular room, under lock and key, saying that he will not otherwise answer for their safety, and the guest refuse, and the goods are stolen, the landlord does not receive and is not answerable for them.[1] Undoubtedly, the circumstances are to be considered in determining the question of liability; though the inn be full, if the traveler is actually received as a guest, the landlord should be answerable, as much in one case as in another. But there is a good reason for saying that the inkeeper should be permitted to dictate as to the mode in which the goods of the guest shall be secured; for it would be unreasonable to hold him responsible for goods, retained from his actual custody.[2] Nothing being said on the subject, he is answerable for them, though they are placed in the guest's chamber and the key delivered to him;[3] for the landlord at his peril is bound to keep safely the goods of his guest.

By entering into a special agreement for the custody of his goods, the guest may release the inkeeper from his liability; as where he directs his horse to be turned out to pasture, or stipulates for a room for some other purpose than that of merely lodging in it, taking the key and occupying it with his goods.[4] But if he stipulate for a room only as a guest, he does not release the landlord.[5] If he becomes a lodger, that is, if he make a contract for his board for a length of time, he is no longer a guest.[6]

The duties of innkeepers are understood to be regulated by the common law in all the United States, except Louisiana;[7] in which the innkeeper is responsible, as for a necessary deposit, for the effects brought by travelers, whenever they are delivered into his care, or into the hands of his servant; and he is also responsible if any of the effects be stolen or damaged by his servants or agents, or by strangers going or coming in the inn; but he is not responsible for

[1] Bac. Abr., Inns and Innkeepers, C 4.
[2] Calye's Case, 8 Co. R., 33.
[3] Farnworth Packworth, 1 Stark. R., 198; 4 Maule and Sel., 306.
[4] 8 Barn. and Cres., 9.
[5] 5 Mod. R., 427; 1 Salk., 387.
[6] Story on Bailm., § 485.

what is stolen by force and arms, or by the breaking open of his house, or by any other extraordinary violence.[1] One witness is sufficient to establish the deposit; at common law the party himself may prove the contents and value of a lost trunk, but not any other fact going to establish his right of action.[2]

The testimony of the party plaintiff may be received to show the character and value of the property lost, so far as it is personal baggage. He is considered a competent witness from the necessity of the case, and in order to prevent a failure of justice. This is distinctly held in the case of Taylor v. Monnot, recently decided by the superior court in the city of New York. Upon the trial the plaintiff proved by the testimony of traveling companions, that on the tenth of January, 1853, he put up at the defendant's hotel; that on the eleventh he locked the door of his room and went to dinner, and on his return found the door of his room unlocked, the lock of his portmanteau broken open, its contents scattered about the room; and also, by the same testimony, that he had been accustomed to keep his money, which was mostly in gold, in his portmanteau. The testimony of the plaintiff was then offered, to show the contents of his portmanteau. It was objected to as incompetent, but admitted and exception taken. It showed that among other articles in his portmanteau was his purse, containing $353.24, which was stolen. The case, therefore, turned entirely upon the question whether the plaintiff was properly admitted as a witness. The court, per Duer, J., in delivering the opinion, observed: "We are by no means prepared or disposed to say that in actions like the present, the plaintiff is a competent witness to prove the nature and extent of his loss, whatever may be the character or value of the property which it is alleged the loss involved. On the contrary, we are clearly of the opinion that his admissibility as a witness, rests upon the same ground, and is subject to

[1] Code of Louisiana, art. 2935 to 2940.

[2] Snider v. Geiss, 1 Yeates R., 34; but see David v. Moore, 2 Watts and Serg., 230; Clark v. Spence, 10 Watts R., 335.

the same limitation, as that of a passenger admitted to prove his own loss in an action against a carrier; and after a careful examination of the authorities, we think the law ought to be considered as settled, that in such cases the passenger is, to some extent, a competent witness in his own behalf. He is so to prove the contents of a trunk lost or broken open, but only in respect to those articles which may be properly considered as part of his personal baggage; that is, as intended for his personal use or accommodation. It is presumed that the contents of the trunk, in respect to such articles, are known to the owner alone, and, consequently, that were his testimony excluded, he would be without a remedy. He is admitted therefore as a witness to prevent a failure of justice; in other words, from a moral necessity (12 *Viner Abr.*, *p.* 32; *Bull. N. P.*, 181; *Story on Bailm.*, § 454, *note;* 1 *Greenleaf on Ev.*, § 348, *p.* 417, *and note* 2; *Sneider v. Geiss*, 1 *Yeates*, 34; *Herman v. Drinkwater*, 1 *Green. R.*, 27; *Clark v. Spence*, 10 *Watts*, 335; *Johnson v. Stone*, 11 *Humphrey*, 419). It is plain that the same necessity exists when the traveler is a temporary guest at an inn, and equally so, that it extends no further in the one case than in the other."[1]

The party to the action is held a competent witness only *ex necessitate rei;* and in those cases alone where it may be strongly presumed that no other witness can be called to testify on the subject. He is not competent as a general witness for himself, but only to prove facts, which in the nature of things cannot be shown by any other evidence, such as the contents of a lost trunk, portmanteau or box.[2]

[1] 1 Abbotts' Practice Reports, 325.

[2] 1 Greenleaf on Ev., § 348; Wintermute v. Clarke, 5 Sand. R., 242.

CHAPTER VIII.

COMMON CARRIERS.

THE internal and external carrying trade of a highly commercial people forms no inconsiderable element in the national prosperity. To the carrier, as the agent of commerce, is committed the wealth of merchandise shipped on the seas from port to port, and carried along all our rivers, railroads, canals and lakes. In the interest of a business whose influence is so extensive in civil life, the law accords to this subject an important place in our system of jurisprudence, giving to it a consideration proportioned to the numerous and various relations which it involves.

The law establishing the rights and responsibilities of common carriers has grown up out of what is usually denominated the custom of the realm, and has been constantly adjusted and modified in furtherance of a wise commercial policy.[1] In order to give due security to property, the law imposes upon the carrier the responsibility of an insurer. To prevent litigation and the necessity of going into circumstances impossible to be unraveled, the law, in case of loss, presumes against the carrier, unless he can show it happened by public enemies, or by such an act as could not be attributed to the intervention of man, as storms, lightning and tempests. On account of the opportunity he has for collusion with thieves and robbers to the infinite injury of commerce, he is held answerable for all losses that occur by theft or robbery.[2] Because of the rigor of the rule enforced against him, he is entitled to demand a compensation for his services in proportion to his risk. Over against

[1] Forward v. Pittard, 1 Term R., 27.

[2] Riley v. Horne, 5 Bing. R., 217; Jones on Bailm., 103.

his extraordinary responsibilities, he has some special and peculiar privileges; for we find that in the wisdom of the law, duties are everywhere compensated with rights.[1]

Who are Common Carriers.

A person is not a common carrier who on a single occasion sends his servant to transport goods belonging to a particular individual, from one place to another, as from Albany to Schenectady.[2] To constitute him a common carrier, he must be one who as a regular business, undertakes for hire or reward to transport the goods of such as choose to employ him, from place to place.[3] He is not a common carrier, unless his employment be to carry goods generally for any one, so as to imply a public engagement to serve all persons alike on being tendered a suitable reward.[4] In other words, if he undertake for hire or reward to transport the goods of all persons, indifferently, that is, of all such persons as choose to employ him, from place to place, he is a common carrier;[5] and his employment is of such a public character as obliges him to accept business whenever it is offered to him on reasonable terms.[6]

It is not necessary, in order to make him a common carrier, that he should pursue the business constantly or continuously; a wagoner who carries goods for hire, thereby contracts the responsibility of a common carrier, whether transportation be his principal and direct business or only an occasional and incidental employment.[7] The practice of carrying for hire, parcels not belonging to passengers, in a stage coach, constitutes the proprietors of the coach common carriers; and the responsibility is the same, whether the driver is told that a package of bank-notes delivered to him con-

[1] Orange Co. Bank v. Brown, 9 Wend. R., 85.

[2] Satterlee v. Groat, 1 Wend. R., 272.

[3] Blanchard v. Isaacs, 3 Barb. R., 388.

[4] Trent and Mersey Navigation v. Wood, 3 Esp. R., 127; Story on Bailm., § 495.

[5] Gisbourn v. Hurst, 1 Salk. R., 249; Dwight v. Brewster, 1 Pick. R., 50.

[6] 3 Hill R., 20.

[7] Gordon v. Hutchinson, 1 Watts. and Serg. R., 285.

tains money, or papers as valuable as money.[1] But it has been held that the driver of a stage coach, in the general employ of the proprietors of the coach, who is in the habit of carrying packages of money for a small compensation, which was uniformly twenty-five cents each, whatever might be the amount of the package, is a bailee for hire answerable only for ordinary negligence, and not subject to the responsibilities of a common carrier; there being in the case no evidence to show him a common carrier, other than the fact that he took such packages of money as were offered.[2]

No person is a common carrier, in the sense of the law, who is not a carrier for hire. It is not necessary that the compensation should be a fixed sum; it is sufficient if it be in the nature of a *quantum meruit* enuring to the benefit of the owners; nor is it necessary that the goods or property should be entered upon a freight list, or that the contract be verified by a written memorandum, however convenient both of these might be in ascertaining the true understanding of the parties, as to the character of the bailment.[3] Whether a steamboat company are common carriers of money for hire, so as to charge them with a package of of bank-bills and accounts intrusted to the master of the steamboat for carriage, is a question of fact; if they have been in the habit of carrying money for hire, or have held themselves out to the public as common carriers of money and bank-bills, they are answerable in that capacity.[4] But such a company is not liable for the loss of packages of bank-bills, intrusted to the captain of their boat, unless it be shown that they have made the carriage of such packages a part of their ordinary business.[5] If it appear that the captain had been forbidden by his employers to carry money, that he had never knowingly carried any, that the usage was for persons sending money to compensate the captain,

[1] 1 Pick. R., 50.

[2] Sheldon v. Robinson, 7 N. Hamp. R., 157.

[3] The Citizens' Bank v. The Nantucket Steamboat Company, 2 Story R., 16

[4] 2 Story R., 16.

[5] Sewall v. Allen, 6 Wend. R., 335.

and that the owners charged freight only on specie, the company is not a common carrier of money. A package of bills delivered under such circumstances, to be carried, as from New-York to Albany, will be deemed a personal trust, committed to the captain; especially where the compensation therefor is his personal perquisite, and the package is delivered to the captain as a trustworthy person with whom, on inquiry, it is considered prudent to send money.[1]

If a carrier is in the habit of transporting goods for hire, an agreement to pay the usual price, or what the transportation and risk are reasonably worth, if no specific charge for such articles has been adopted, will be implied from the delivery to the carrier for transportation.[2] If the carrier personally, or by his authorized agent, receive the goods under such circumstances, he does so as a common carrier and becomes legally answerable for their safety as well as their carriage. A delivery to his agent or servant of such goods as it is the custom of the carrier to receive for carriage, is a delivery to himself; not so as to the delivery of goods out of his line of business, unless they be so nearly within it that the person delivering them has reason to suppose they are fairly within the ordinary scope of the agent's authority to receive and transport.[3] The carrier, receiving a passenger with a trunk as his baggage, is responsible if the baggage is lost, though no distinct price be paid for its transportation; the compensation for its conveyance is, in contemplation of law, included in the passenger's fare; but the carrier is not liable for a large sum of money deposited in the trunk which is delivered as baggage, though spoken of in the act of delivery as a trunk of importance.[4]

A carrier of passengers is not subject to the same strict rule of responsibility for injuries to the person, as to the goods of a passenger. Thus, a company, using steamboats

[1] 2 Wend. R., 327; 6 Wend. R., 356, 358; 7 N. Hamp. R., 157.

[2] 6 Wend. R, 350; 2 Story R., 16.

[3] Esp. Dig., 622; Halsey v. Brown, 3 Day's R., 346; Renner v. The Bank of Columbia, 9 Wheaton R., 590; 6 Wend. R., 361, 350.

[4] 9 Wend. R., 85.

and railroads for the transportation of passengers and their baggage, are liable as common carriers for damages happening to the baggage of passengers from a defect in the vehicles or machinery used, although the company is not chargeable with actual negligence, or want of skill, or want of care, in securing the safety of the baggage; and nothing will excuse the company but inevitable accident arising from superhuman causes, or the acts of the enemies of the country;[1] while, for injuries happening to the persons of the passengers, the company is not liable to respond in damages, provided they have done all that human foresight and care can do to insure the safety of the passengers.[2] The law, regulating the responsibility of common carriers, does not apply to the case of carrying intelligent beings; in other words, the carrier of passengers is not strictly a common carrier.[3]

As defined by Chancellor Kent, common carriers consist of two distinct classes of men, namely, inland carriers by land or water, and carriers by sea; in the aggregate body are included the owners of stage-wagons and coaches, who carry goods as well as passengers for hire, wagoners, teamsters, cartmen, the masters and owners of ships, vessels and all water-craft, including steam vessels and steam tow-boats, belonging to internal as well as coasting and foreign navigation, lightermen and ferrymen.[4]

It is adjudged that the owners of a steamboat who undertake for hire to tow a canal boat and her cargo, her master and hands remaining on board and in possession, are not common carriers, but only responsible as ordinary bailees for hire; and this, though they carry on the towing of boats as a business, holding themselves out as ready to engage for all who may desire their services.[5] A town or city carman,

[1] The Camden and Amboy Railroad and Transportation Company v. Burke, 13 Wend. R., 611.

[2] 13 Wend. R., 627, 629; Christie v. Griggs, 2 Camp., 80.

[3] Boyce v. Anderson, 2 Peter's U. S. R., 150.

[4] 2 Kent's Comm., 598, 599.

[5] Alexander v. Greene, 3 Hill R., 9; and S. C., 7 Hill R., 533; 2 Comst. R., 204.

whose carts ply for hire near the wharfs and who lets them by the hour, day or job, is not a common carrier; such a person, though not liable as a common carrier, for losses by theft or robbery, is responsible for the negligence of his own servants;[1] if he accept goods to carry, saying "I will warrant they shall go safely," he assumes the responsibility of a common carrier notwithstanding the owner of the goods sends his own servant to look after them.[2] Whether or not he accepts them as a common carrier, is a question of fact.

In Robertson & Co. v. Kennedy, the defendant had been in the habit of hauling for hire, with an ox team driven by his slave, in the town of Brandenburgh, for every one who applied to him; and had undertaken to haul for plaintiffs a hogshead of sugar, and after the slave had placed it on a slide for the purpose of hauling it to plaintiffs' store in Brandenburgh, the slide and hogshead slipped into the river, and the sugar was spoiled; and the court held the defendant answerable as a common carrier, using in the decision of the cause these words: "Every one who pursues the business of transporting goods for hire, or for the public generally, is a common carrier. According to the most approved definition, a common carrier is one who undertakes for hire or reward to transport the goods of such as choose to employ him, from place to place. Draymen, cartmen and porters, who undertake to carry goods for hire, as a common employment, from one part of a town to another, come within the definition." The distance from the river to the plaintiffs' store is not stated in the case.[3]

Draymen, cartmen and porters clearly enough come within the terms of this definition, which has the sanction of the very best authority.[4] But it may well be doubted whether they come within the reason and spirit of the law establishing the responsibility of common carriers, and it is certain

[1] Robinson v. Dunmore, 2 Bos. and Pul. R., 417.

[2] 2 Bos. and Pul. R., 417.

[3] 2 Dana R., 430; 2 Kent's Comm., 598, 599; Story on Bailm., § 496.

[4] Per Ch. Justice Parker, in Dwight v. Brewster, 1 Pick. R., 50; Story on Bailm., § 495; 7 N. Hamp. R., 157; 3 Barb. R., 388; 2 Story R., 16; 2 Kent's Comm., 599; 1 Salk. R., 249.

that they are not so regarded in England, and not commonly so described.[1] Since the law applicable to the common carrier is one of great rigor, its application should not be extended to cases where the reason of the law does not apply.[2] His extraordinary liability is enforced on grounds of public policy. In order to prevent clandestine combinations with thieves, collusive litigation, and the necessity of going into circumstances impossible to be unraveled, the law always presumes against the carrier, unless he shows the injury to have been done by the king's enemies, or by such acts as could not happen by the intervention of man, such as storms, lightning and tempest.[3] Dangers, arising from collusion like these, can hardly be apprehended in the carriage of goods by carmen from street to street, or from place to place within a city.

It is true the carman sometimes acts in the discharge of a common carrier's duty, as his agent or servant, in the delivery of goods at their place of destination. In this case the liability of the carrier continues until the delivery is completed; for the law contemplates no other bailment than that between the owner and the original carrier.[4]

The wagoner. Gibson v. Hunt, was an action of trover for goods, taken as a distress for rent, which had been put with the wagon into a barn. The person to whom they had been intrusted had for some short time past carried cheese to London, and usually loaded back with goods, for a reasonable price, for all persons indifferently; and it was resolved by the court, after consultation, that any man undertaking for hire to carry the goods of all persons indifferently, as in this case, is as to his privilege, a common carrier; for the

[1] Robinson v. Dunmore, 2 Bos. and Pul. R., 417; Jeremy's Law of Carriers, 4–21; Brind v. Dale, 8 Car. and Payne R., 207; Angel on the Law of Carriers, § 74.

[2] 2 Peters' U. S. R., 150.

[3] Rich v. Kneeland, Hob., 18.

[4] Hyde v. Trent and Mersey Navigation Company, 5 Term R., 389; Jeremy's Law of Carriers, 68; Garside v. Trent and Mersey Navigation Company, 4 Term R., 581.

law has given the privilege in respect of the trader, and not in respect of the carrier.[1]

Formerly, in this country as well as in England, most of the carrying business by land was done by wagoners, who followed it as a regular employment, holding themselves out to the community as ready to receive and carry any goods that might be offered to them on their route; and accordingly they were held common carriers.[2] The word *common* is added to distinguish them from one who undertakes for hire, on a particular occasion to carry goods for another, and who is not answerable in all events, but only for neglect. In Pennsylvania, where at one time the carriage of goods into the interior of the state was chiefly done by farmers returning from market, it has been held that a wagoner, who carries goods for hire, incurs the responsibility of a common carrier, whether transportation be his principal and direct business, or only an occasional and incidental employment.[3] This decision lies close by, if it does not trench upon the line which separates the common carrier from the ordinary bailee for hire. If he does not make it his common and ordinary business to carry goods, that is to say, if he does not exercise it as a public employment, so that he may be compelled to accept the carriage of goods, he is not a common carrier.[4] This is, perhaps, the true and real test, though in this country the cases on the subject are by no means harmonious.[5]

If the carrier does not make it his common and ordinary employment to carry goods, but engages on one occasion only, or if having been engaged as a common carrier he discontinue the business, and afterwards enter into a special contract to carry several loads of goods from one place to

[1] 1 Salk., 249, Cro. Eliz., 596.

[2] Satterlee v. Groat, 1 Wend. R., 272; Forward v. Pittard, 1 Term R., 27.

[3] Gordon v. Hutchinson, 1 Watts and Serg. R., 285; Powers v. Davenport, 7 Blackf. (Ind.) R., 497.

[4] Cole v. Goodwin, 19 Wend. R., 261; 2 Kent's Comm., 599; Harris v. Packwood, 3 Taunt. R., 271; Riley v. Horne, 5 Bing. R., 217: 2 Show R., 127, 327.

[5] Against Jackson, 1 Hayw. R., 141; 1 Watts and Serg. R., 285.

another for a single individual, he is not a common carrier, even if his driver, disobeying his instructions, receive a load from another person.[1] The nature of his employment is to be ascertained as a fact, from evidence that he has held himself out to the public as a common carrier; and then the delivery of goods to the servants or agents of the carrier for transportation will be sufficient to charge him as such.[2]

It is clear that where a party refuses to place any confidence or trust in the carrier, as by sending his servant with the goods, or retaining them in his own hands, there being no bailment of them to the carrier, they never can be considered to have been in his possession, so as to charge him as a general servant or a special bailee; as to such goods he is not a common carrier.[3]

Proprietors of Stage-coaches. The proprietor of a stage, who regularly carries for hire passengers and their baggage, is responsible as a common carrier for the baggage, if lost, although no distinct price be paid for its transportation; the compensation for its conveyance being by intendment of law included in the fare of the passenger.[4] The term baggage is understood to include such articles of necessity, or personal convenience, as are usually carried by passengers for their personal use, and not merchandise or other valuables, carried in the trunks of passengers designed for other purposes, such as sale and the like.

At an early day coachmasters were not considered to fall within the description of common carriers, nor to be liable as such, except in cases where they received a distinct price for the carriage of goods; but if the coachman or driver took money indiscriminately for carrying goods, he was deemed a carrier, whether the goods belonged to a passenger or stranger.[5] Where the custom prevailed of charging for overweight, he was always held liable as a carrier for

[1] 1 Hayw. R., 14; 1 Wend. R., 272.
[2] 9 Wend. R., 85; Tower v. Utica and Schenectady Railroad Co., 7 Hill R., 47.
[3] East India Co. v. Pullen, 1 Stra., 690; 7 Hill R., 47.
[4] 9 Wend. R., 85; 25 id. 459; 6 Hill R., 586; 3 Barb., R., 388.
[5] Middleton v. Fowles, 1 Salk., 282; Lovett v. Hobb, 2 Show. R., 127.

the goods so carried.[1] But he did not usually receive heavy luggage for transportation; and that which he did accept was received more for the accommodation of passengers than as a direct object of profit to the owners.[2]

But the rule is now well settled, in England as well as in this country, that the passenger's luggage is to be considered as within the custody of the proprietor of a stage as a common carrier; the price of the passenger's fare being understood to cover the carriage of his baggage also.[3] A contract to carry the ordinary luggage of the passenger is implied from the usual course of business, without anything being said on the subject; but this implied contract does not include either money or merchandise deposited in a trunk and carried as baggage.[4] In England, however, the proprietor of a coach has been held answerable for the contents of a lost trunk containing wearing apparel and jewels, though its contents were not disclosed, and notwithstanding there was a general notice in the stage office, which the passenger had an opportunity of seeing, limiting the proprietor's responsibility to five pounds, unless a disclosure was made of the value of the contents of the trunk.[5] But with us the carrier is not responsible for a large sum of money placed in a trunk and delivered as baggage.[6] So, it is held in Ohio that the proprietors of stage-coaches are common carriers who cannot limit their responsibility by even actual notice to a traveler that his baggage is at his own risk; and that a watch is a part of his baggage, that may be properly enough placed in his trunk.[7] In this state, too, such a notice is entirely nugatory; for the proprietors of stage-coaches, being common carriers of merchandise, cannot relieve themselves from responsibility for goods intrusted to them for

[1] Jeremy's Law of Carriers, 11, 12.

[2] Clark v. Grey, 6 East. R., 564.

[3] Brook v. Pickwicke, 4 Bing. R., 218; Peixotti v. M'Laughlin, 1 Strob. R., 468.

[4] Hawkins v. Hoffman, 6 Hill R., 586; Pardee v. Drew, 25 Wend. R., 459.

[5] 4 Bing. R., 218; Powell v. Myers, 26 Wend. R., 591.

[6] Orange Co. Bank v. Brown, 9 Wend. R., 85.

[7] Jones v. Voorhees, 10 Ohio R., 145; Hollister v. Nowlen, 19 Wend. R., 234.

carriage, even by a notice brought home to the knowledge of the owners.[1]

Where one who was a common carrier, received a package of money to carry from Sherman in Connecticut, to a bank in Poughkeepsie in this state, and it appeared that when the stage driver arrived at Poughkeepsie the bank was shut, that he went twice to the house of the cashier, and not finding him, carried the money back and offered it to the owner, who declined to receive it, when the carrier refused to be responsible for any loss or accident; it was held that these facts, in the absence of any special contract, none being proved, did not constitute a legal excuse to the carrier for the non-performance of his undertaking.[2]

In respect to passengers, the proprietors of stage-coaches are not deemed common carriers, and are not answerable for injuries resulting from no want of care and foresight on their part. In other words, the carrier of passengers binds himself to carry safely those whom he takes into his coach, *as far as human care and foresight will go;* that is, for the utmost care and diligence of very cautious persons.[3] For the goods and baggage which he receives for transportation, he is placed upon the ordinary footing of the common carrier; but he does not absolutely warrant the safety of passengers.[4]

Hackney coachmen are not chargeable as carriers for a passenger's goods, unless under a special agreement, and then it is doubtful whether they ought not to be charged in respect of such agreement rather than on the custom. And the reason of this seems to be, that their employment is intended more for the convenience of persons than for the carriage of goods; and so is neither within the definition of a common carrier, nor the policy of the regulations instituted concerning them.[5] The same rule holds true in

[1] Clark v. Faxton, 21 Wend. R., 153; 19 Wend. R., 234; id., 251.

[2] Merwin v. Butler, 17 Conn. R., 138.

[3] Camden, &c., Company v. Burke, 13 Wend. R., 611; Christian v. Grigg, 2 Campb., 79; 2 Esp. R., 533; Sharp v. Grey, 9 Bing. R., 457.

[4] 2 Kent's Comm., 600, 601.

[5] Upshare v. Aidee, Comy., 25.

regard to all persons whose business is restricted to the carriage of passengers.[1]

The person holding himself out to the community as a common carrier must assume also the responsibility of one. Where the owners of a stage-coach employ a driver under a contract, that he shall receive a certain sum of money per month, and the compensation that should be paid for the carriage of small parcels, the owners are answerable for the negligence in not delivering a parcel of that description, intrusted to him to carry, unless the arrangement is known to the proprietor of the goods, so that he contracts with the driver as principal.[2]

Masters of Vessels. The master of a vessel also comes within the description of a common carrier. Although he receives his salary from the owners, it does not affect or annul his common law liability, if he does not keep the goods delivered into his custody safely. This rule was first adjudged in the reign of Charles the Second, on the following grounds: First, because he takes a reward, and the usage is, that half wages are always paid him before he goes out of the country. Second, that he may make a reserve and caution for himself. Third, that no difference can be assigned between him and a hoyman, common carrier, or innholder. Fourth, that he is rather an officer than a servant, having power to impawn the ship, and to sell *bona peritura*. In effect, too, his reward is paid by the merchants upon the same condition as freight is to the owners; namely, that such freight is earned, without which his wages would not be due.[3]

This decision was made in Mors v. Slue, which was an action brought against the master of a ship for goods delivered into his custody, and stolen from the ship without his fault, by persons pretending themselves to be officers with a warrant to search, and the defendant, who had been used to

[1] Aston v. Heaven, 2 Esp. R., 533; 2 Campb. R., 79; 9 Bing. R., 460.
[2] Bean v. Sturtevant, 8 N. Hamp. R., 146; 7 id., 157.
[3] Jeremy's Law of Carriers, 8.

receive the freight and make contracts for transporting goods, was held responsible as master.[1]

The master is liable to the merchant from whom he receives goods for transportation, precisely to the same extent and in the same form of action as the owner; but he is liable in a different character and on a different ground.[2] The owner is liable by reason of his public employment and the profit derived from it for freight. The master is liable on his own contract for the transportation of the goods and by virtue of his taking charge of them for that purpose. The liability of the owners is implied by law, from the nature of their employment, on the ground of public policy; while that of the master, who is not an owner and receives no part of the freight, seems to arise rather from his express undertaking; still, on the same ground of policy and in favor of commerce, he is held personally responsible on his contract, even where the owners are known, which is thus far a departure from the general law of principal and agent.[3]

Masters of vessels who undertake to carry goods for hire, are liable as common carriers, whether the transportation be from port to port, within the state, or beyond sea, at home or abroad; and they are answerable, as well by the marine law as by the common law of England, for all losses not arising from inevitable accidents, or such as could not be foreseen or prevented.[4] In an action of assumpsit on a bill of lading signed by the master, of goods shipped, as from Liverpool to New York, he is answerable for any deficiency in the cargo, whether embezzled or otherwise lost.[5] And the rule of damages is their value at the place of destination. In his relation to the shipper or consignee of goods, the master is both a principal and an authorized agent of the owners of

[1] 1 Ventr. R., 190, 238; 2 Ld. Raym., 919; 2 Kent's Comm., 599.
[2] Patten v. Magrath, 1 Rice R., 162.
[3] 1 Rice R., 162, S. C.
[4] Elliott v. Russell, 10 John. R., 1; Schieffelin v. Harvey, 6 John. R., 171.
[5] Walkinson v. Lawton, 8 John. R., 213.

the vessel intrusted to him;[1] but he is not liable on a bill of lading signed by him *jointly* with the owners.[2]

Owners of Vessels. The owners of vessels employed in the carrying business on our lakes and rivers, or on the high seas, are common carriers of such goods as they hold themselves out to the community as ready to receive and transport from place to place.[2] It was at one time held in this state that the owners of a vessel transporting goods on the high seas are not common carriers, within the meaning of the rule, subjecting them to all losses or injuries, which arise from any other cause than the act of God, or the enemies of the country; and that in an action against them for loss or damage from any other cause, it should be submitted to the jury, upon the evidence, whether they used ordinary care and diligence.[3] But this doctrine is in direct conflict with previous decisions of the same court, and it has been since overruled.[4] In recent cases the carrier upon the high seas is uniformly regarded as a common carrier, in the same manner, and to the like extent, as the carrier upon land, except in so far as his responsibility is limited by statute.[5]

The English decisions are to the same effect, holding the owners of vessels, loading and carrying goods to and from foreign ports, answerable as common carriers.[6] In short, it is deemed a settled point, that masters and owners of vessels are liable in port, at sea and abroad, to the whole extent of inland carriers, unless exempted by the exceptions in the contract of charter party, or bill of lading, or by statute. Under the marine law the rule of liability is essentially the same.[7]

[1] Kemp v. Coughtry, 11 John R., 107; Bussey v. Donaldson, 4 Dallas R., 296; 1 Wash. (Cir. Co.) R., 142.

[2] Sewall v. Allen, 6 Wend. R., 335; 2 Wend. R., 327.

[3] Ayman v. Astor, 6 Cowen R., 267.

[4] 10 John. R., 1; 11 John. R., 107; 6 John. R., 170; 8 John. R., 113; Gould v. Hill, 2 Hill R., 623; Dorr v. N. J. Steam Navigation Co., 4 Sand. R., 136; Wilcox v. Parmelee, 3 Sand. R., 610.

[5] Price v. Powell, 3 Comst. R., 322; see Act of Congress of 1851.

[6] Fragano v. Long, 4 Barn. and Cres. R., 219; 10 John. R., 7; 2 Kent's Comm., 609.

[7] 10 John. R., 8; M'Clure v. Hammond, 1 Bay's R., 99; Bell v. Reed, 4 Binn. R., 127.

Whether or not the owner of a vessel is to be deemed a common carrier, in any particular case, depends upon the nature of his employment. Where a ship is not put up to freight, but employed by the owner on his own account, and the master receives goods of another person on board as part of his privilege, taking to himself the frieght and commissions, the owner is not answerable for the conduct of the master in relation to such goods.[1] The reason of this rule is, that the owner of a ship is bound by the lawful contracts of the master only when made by him relative to the usual employment of the vessel. The usual employment is evidence of the authority given by the owner to the master, to make contracts for him. Outside of his usual line of business, he has no such authority.

So, where the owner of a vessel accompanies her, and does not advertise her for frieght as is usual in the port from which she loads, but intends to frieght her with a cargo for himself, not intending to take freight for others, if the master, without the knowledge of the owner, receive on board goods as his adventure, the owner is not answerable for them.[2] But if the owner go as supercargo, and know of a shipment by the master, without dissenting, thus adopting his acts, he is liable, because he appoints the master, and a degree of credit is given him by his appearance in a situation of so much trust; and the ship owner may be considered as giving a permission to the master to take freight on his own account, without denying his own responsibility for the safe delivery of the goods.

In deciding the cause of Walter v. Brewer, the court observe: "We cannot think, when a merchant sends his ship abroad with a supercargo, which is often the case, and with no expectation or design of taking freight, that a foreign shipper of goods may make a private bargain with the master, and at the same time avail himself of the general liability

[1] King v. Lenox, 19 John. R. 235.

[2] Walter v. Brewer, 11 Mass. R., 99. If the owner of a vessel does not employ her as a common carrier, he will not be deemed such any more than a carrier by land.

of the owner to secure him from the misconduct of the master. Such a principle would be mischievous to ship-owners and be productive of frauds, by holding out temptations to treat with the master for less than the ordinary freight to the prejudice of the ship-owner, who would receive no consideration for the risk he incurs. It seems to be reasonable as well as lawful, that the shipper of goods who deals altogether with the master, expecting to avail himself of his privilege to carry a few tons as his private adventure, and knowing that the owner intended to load the vessel for himself, should not have recourse to the owner in case of embezzlement; for in such a case the shipper puts trust in the master alone, and the owner may be utterly ignorant that the property is on board, for which he is to be made liable."[1]

In order to render the owner of a vessel liable for the contracts of the master, it must be proved that the vessel was in the employment of the owner, that the master was appointed by him, and that he acted in making such contracts within the scope of his authority.[2] Outside of the usual business in which the vessel is employed, the master has no authority to bind his principal;[3] and accordingly a private contract with the master to carry property, the carriage of which is known not to be within the vessel's ordinary business, will not render the owners responsible. If the owner parts with a vessel for the season, on an agreement to receive a certain part of the net proceeds of her earnings, the charterer for the season is to be considered as the owner, and responsible as such.[4] So, if the vessel is not employed as a general ship to carry goods for hire, but sent on a voyage for a special purpose, the master, by taking goods of his own motion, such as coin, cannot make the owners liable.[5]

[1] 11 Mass. R., 99.
[2] Reynolds v. Tappan, 15 Mass. R., 370.
[3] Allen v. Sewall, 2 Wend. R., 327; 6 Wend. R., 335.
[4] 15 Mass. R., 370.
[5] Boncher v. Lawson, Cas. T. Hard, 194.

Though the master of a vessel while abroad, is the agent of the owners, and has power to make contracts in relation to freight, which are binding upon the owners, when an owner is on board, and exclusively attending to the shipment of the cargo, he is not bound by the master's contract. But, to relieve himself from liability, he must show the fact that he was exclusively attending to the shipment of the cargo; and he must show the same thing, though he was on board as supercargo. Otherwise, though he be one of the owners and present as supercargo, if the master of a general ship receipt a quantity of goods, such as Spanish dollars, for transportation, as from New Orleans to New-York, even without the knowledge of the owner and without putting them on the freight list, the owners will be liable for their value, if stolen on the voyage.[1] The vessel being what is called a general ship, that is, one in which the master or owners engage separately with a number of persons unconnected with each other, to convey their respective goods to the place of the ship's destination, the master has authority to receive goods on freight, unless prohibited by the presence of the owner, exclusively attending to the shipment of the cargo.[2]

There is no distinction between the owners of ships carrying goods on the high seas from port to port along the coast, or from country to country, and the owners of steamboats that ply upon the inland waters as carriers for all persons indifferently. In other words, the rule of responsibility is the same in respect to a carrier by water as to a carrier by land; nor is there any distinction, whether the navigation be upon the ordinary rivers, or the great rivers and lakes or inland seas of this country, except so far as the exceptions in favor of the carrier are extended to the perils or dangers of the rivers or lakes by the special terms of the contract, contained in the charter party or bill of lading.[3]

[1] Ward v. Green, 6 Cowen R., 173.

[2] 6 Cowen R., 176, 177.

[3] Sears v. M'Arthur, 21 Wend. R., 190; Elliott v. Rossell, 10 John. R., 1; Bell v. Reed, 4 Binn. R., 127; 6 Wend. R., 335; 3 Esp. R., 127; Hastings v. Pepper, 11 Pick. R., 81; Crosby v. Fitch, 12 Conn. R., 410.

In like manner, the owners of boats transporting goods and merchandise on the canals, for the public generally, are common carriers,[1] by whom a very large amount of the carrying business of the country is transacted. The owner of boats employing them for that purpose is a carrier; but he may and does often by association with others, become a carrier on waters where he has no boats. The legal character of a common carrier depends upon the nature of the business, and not at all upon the means by which it is carried on.[2] Hence, hoymen, barge owners, wharfingers and ferrymen, employed habitually in carrying goods for all persons indiscriminately for hire, are deemed common carriers, subject to all the liabilities incident to the business.[3] But the wharfinger is a common carrier only where it is his duty to carry goods in lighters to and from vessels in the river. He is not ordinarily a carrier.[4] The ferryman, too, is held to be liable as a common carrier, but the mode in which he transacts his business must be ascertained in order to fix his character.[5] So as to the common bargeman, he is a common carrier if he be accustomed to carry goods for hire for the public generally, from place to place, as from London to Milton and other places in Kent.[6]

It is proper to observe that it is not necessary to declare against the common carrier on the custom, that the form of the action is not material so long as he is shown to be a common carrier, and charged as such. In an action upon the case against a shipmaster or keelman, who carries goods for hire from port to port, alleging a special agreement to carry hardware, and that by defendant's negligence the wares were rusted and impaired in value, the defendant offered to give in evidence that he had taken all possible care of the

[1] Arnold v. Hallenbake, 5 Wend. R., 33; Fairchild v. Slocum, 19 Wend. R. 329.

[2] 19 Wend. R., 329.

[3] Jones on Bailm., 106, 107; Jeremy's Law of Carriers, 7, 8, 9.

[4] Maving v. Todd, 1 Stark. R., 59; Platt v. Hibbard, 7 Cowen R., 497.

[5] Cook v. Gourdin, 2 Nott and McCord R., 19; Rutherford v. M'Gowen, 1 id., 7.

[6] Rich v. Kneeland, Cro. Jac., 330.

goods, that the rats made a leak in the keel or hoy, which in spite of all efforts at pumping caused the damage; the evidence being received and a verdict had for the defendant, Chief Justice Lee observed: "I am of opinion that the evidence given for the defendant was not admissible; the declaration is that the defendant undertook for hire to carry and deliver the goods safe, and the breach assigned is that they were damaged by negligence; this is no more than what the law says, everything is a negligence in a carrier or hoyman, that the law does not excuse, and he is answerable for goods the instant he receives them into his custody, and in all events, except they happen to be damaged by the act of God or the king's enemies, and a promise to carry safely is a promise to keep safely."[1] So, if he injure goods in lowering them into the hold of the vessel.[2]

Where the master of a store-ship in the king's service takes in the bullion of a private merchant on freight, as from Gibralter to Woolwich, giving a receipt for the delivery of the same (the act of God and the king's enemies only excepted), he assumes the responsibility of a common carrier, and is liable for the loss of the bullion, though stolen out of his cabin after the ship's arrival.[3] So, an action lies against the commander of a ship of war who takes the bullion of a private merchant on board to carry, as from the river La Plata to London, for not safely keeping and delivering it; and he must answer for it, if it be plundered by the crew.[4] Whether he be a carrier or a private person, if he undertake for hire to carry and deliver goods safely, he is responsible for the goods.[5] And even if he be not a common carrier and make no special agreement for their safe carriage, he must excuse the non-delivery of them at their place of destination.[6] If

[1] Dale v. Hall, 1 Wils. R., 281.

[2] N. Goff v. Clinkard, 1 Wils. R., 281.

[3] Hatchwell v. Cook, 6 Taunt. R., 577.

[4] Hodgson v. Fullerton, 4 Taunt. R., 787.

[5] Robinson v. Dunmore, 2 Bos. and Pul. R., 417; Powers v. Davenport, 7 Blackf. R., 497.

Sheldon v. Robinson, 7 N. Hamp. R., 157.

he deviate from the usual and ordinary route unnecessarily, he is liable for any injury thereby occasioned.[1]

The occasional carrier, however, whose servant accepts goods for carriage contrary to his instructions, is not liable to the full extent of a common carrier; he stands in a situation analogous to that of a person who occasionally entertains travelers for pay, like most of the farmers in a new country, and who is not held responsible as an innkeeper.[2]

In remains only to mention that railroad companies carrying passengers for hire are common carriers of their pasgers' baggage; and where they hold themselves out to the community as ready to carry goods and produce on freight, they come under the usual description and responsibilities of common carriers for hire.[3]

Duty of the Carrier to receive.

The carrier stands in the situation of a public servant, and as such is liable to an action for refusing to take charge of goods for carriage, if the hire be tendered him and he has the convenience to carry the same.[4] But the goods must be brought at a reasonable time, in a suitable condition, and be of the kind the carrier is accustomed to receive for transportation; he is not bound to depart from his ordinary and usual mode of business in receiving goods, and is entitled to demand a reasonable compensation as a condition of receiving them.[5]

A case which was tried in England in the beginning of this century may illustrate, to some degree, the carrier's duty in this respect. The plaintiffs had certain agents at Wolverhampton with whom the corn in question was deposited in order to be sent to Birmingham. There was a great dispo-

[1] 7 Blackf. R., 497.

[2] Perkins v. Picket, 9 Yerg. R., 480; Lyon v. Smith, 1 Morris, Iowa R., 184.

[3] Weed v. The Saratoga and Schenectady Railroad Company, 19 Wend. R., 534; 13 Wend. R., 611; Thomas v. Boston and Providence Railroad Co., 10 Metcalf R., 472; 4 Mees. and Welsb. R., 749.

[4] Jeremy's Law of Carriers, 59.

[5] Edwards v. Sherratt, 1 East, 604; Jencks v. Coleman, 2 Sumner R., 221; Riley v. Horne, 5 Bing. R., 217; Bennett v. Dutton, 10 N. Hamp. R., 481.

sition to riot manifested in the neighborhood on account of the prevailing scarcity; and the mob had pulled down a corn mill not far distant, and it was understood that they had threatened to come to the warehouse where this corn was deposited. The agents, alarmed, wrote a letter to the defendant, desiring him to send an extra boat for it as quickly and privately as he could. No answer was received to this; but with the impression that the corn was unsafe where it then was, and that it would fall into the hands of the mob, the plaintiffs' agents finding one of the defendant's boats going by, without any intention of staying at Wolverhampton or seeking to take in goods there, stop the boat, and prevail on the boatmen to take in this corn; and it is afterwards sent away by night in an unusual manner, a person being sent privately to give directions for opening the lock at whatever time the boatman chose to pass. Four or five miles from Wolverhampton part of the corn was seized by the rioters, and in an action against the carrier for the value of the corn so seized, it was left to the jury to say, whether the bags of corn were put on board in the usual course of of dealing with a common carrier; the jury having found a verdict for the defendant, the court refused to grant a new trial, on the ground that the carrier's servants had been prevailed upon to receive the goods, then the object of popular fury and in great danger of being destroyed, out of the carrier's usual course of business. No doubt the circumstances would have justified the carrier in refusing to receive the goods for carriage.[1]

If it be alleged and proved that a common carrier had room and convenience to carry goods, and that he refused to carry them, though offered his hire, an action lies against him, as it does against an innkeeper for refusing to receive a guest for whom he has room.[2] If he have a valid and sufficient reason for his refusal, he is not liable. Thus, a coachmaster may refuse to receive goods because his coach is full.[3]

[1] 1 East R., 604.

[2] Jackson v. Rogers, 2 Show. R., 327; Doctor and Stud, 270.

[3] Lovett v. Hobbs, 2 Show. R, 127.

And a carrier may refuse to accept goods of great value, for the reason that he does not hold himself out as ready to carry that kind of goods, or for the reason that he has no convenient means of conveying such articles safely.[1] The rule, indeed, is well settled, that so long as a common carrier has convenient room, he is bound to receive and carry all goods which are offered for transportation, of the sort he is accustomed to carry, if they are brought at a reasonable time, and in a suitable condition.

So, too, the proprietors of a stage-coach, who hold themselves out as common carriers of passengers, are bound to receive all who require a passage, so long as they have room, and there is no legal excuse for a refusal. And it is not a lawful excuse, that they run their coach in connection with another coach which extends the line to a certain place, and have agreed with the proprietor of such other coach not to receive passengers who come from that place on certain days, unless they come in his coach. This was so adjudged in the case of Bennett v. Dutton:[2] the defendant was one of the proprietors, and the driver of a stage-coach, running daily between Amherst and Nashua, which connected at the latter place with another coach, running betwen Nashua and Lowell, and thus formed a continuous mail and passenger line from Lowell to Amherst, and onward to Francestown. A third person run a coach to and from Nashua to Lowell; and the defendant agreed with the proprietor of the coach connecting with his line, that he would not receive passengers who came from Lowell to Nashua in the coach of such third person, on the same day that they applied for a passage to places above Nashua. The plaintiff was notified at Lowell of this arrangement, but notwithstanding came from Lowell to Nashua in that coach, and then demanded a passage in the defendant's coach, to Amherst, tendering the regular fare; and the court, by Parker, C. J., ruled that the defendant was bound to receive him, there being sufficient room, and no evidence that the plaintiff was an unfit person to be ad-

[1] Batson v. Donovan, 4 Barn. and Ald. R., 32; Buller N. P., 70.
[2] 10 N. Hamp. R., 481.

mitted, or that he had any design of injuring the defendant's business.

In like manner the proprietors of the steamboats employed in carrying freight and passengers between Providence and New-York, are common carriers, and as such, bound to receive all persons on board, to whose character and conduct there is no reasonable objection, if they have suitable accommodations. But they may rightfully exclude all persons of bad character or habits; all whose objects are in any way to interfere with their interests, or to disturb their line of patronage, and all who refuse to obey the reasonable regulations, which are made for the government of the steamboat; and they may rightfully inquire into the habits and motives of passengers who offer themselves.[1]

Delivery to the Carrier.

In order to charge the carrier with goods, there must be a delivery of them into his custody; to the carrier personally, to his agent or servant, or some one acting in his behalf and authorized to receive them.[2] Where goods are left for a carrier at an inn-yard, or warehouse, at which other carriers put up, it is not considered a delivery, so as to charge the carrier without a special notice of their being so delivered, or some previous instructions to that effect.[3] As it is the possession of the goods which raises his duty to answer for their custody and carriage, it is necessary in all cases to show that the goods came into his possession for transportation.

In an action by the East India Company v. Pullen, a common lighterman on the Thames, it was held that the usage of the company to place an officer called a guardian, in the lighter, altered it from the common case, this not being any trust in the defendant, and that the goods were not to be considered as ever having been in his possession, but in the possession of the company's servant, who had in effect hired

[1] Jencks v. Coleman, 2 Sumner R., 221.
[2] Selway v. Holloway, 1 Ld. Raym., 46.
[3] 1 Ld. Raym., 46.

the lighter to use himself.[1] But if the carrier actually assume the custody of the goods, he is answerable, notwithstanding the owner sends his servant along with them.[2] If the goods are placed in the carrier's conveyance under a contract that the owner shall go along with them and take care of them, the carrier is not answerable for their safety.[3]

If goods are once delivered to the carrier for carriage, his liability begins from the time he receives them; a quantity of hops was delivered on Thursday to a common carrier, whose public road wagon was not to leave till Saturday morning following; in the night of the day following the delivery, the goods were burned; and in the action against the carrier, he was held answerable, though the jury found expressly that they were destroyed without any actual neglect in the defendant.[4] So, in an action against a carrier for not taking care of and safely carrying goods according to his promise, where it appears that he has limited his responsibility by means of a notice of which the plaintiff was cognizant, the plaintiff having declared against the defendant as a carrier in the usual form, cannot insist that the goods were lost from the defendant's warehouse before the actual carriage of the goods commenced; for as a carrier his responsibility begins from the delivery to him.[5]

The manner of making delivery to the carrier must of course depend very much upon the nature of the articles. Where goods and merchandise are to be carried coastwise, and the usage of the wharf is to deliver them on the wharf to the mate of the ship by which they are to be carried, and they are actually so delivered to the mate, it is sufficient to charge the carrier, though the goods are lost from the wharf before they are shipped.[6] The act of loading a vessel is a part of the carrier's duty, and where the usage is for him to receive and receipt the goods on the quay or wharf, he is re-

[1] 1 Stra., 690.
[2] Robinson v. Dunmore, 2 Bos. and Pull. R., 417.
[3] Brinde v. Dale, 8 Carr. and Payne R., 207; 2 Mees. and Welsb. R., 775.
[4] Forward v. Pittard, 1 Term R., 27.
[5] Roskell v. Waterhouse, 2 Stark. R., 407.
[6] Cobban v. Donne, 5 Esp. R., 41.

sponsible for them from the time he receipts them.[1] A delivery of goods at a wharf is not sufficient to charge the purchaser, unless the seller procures them to be booked where it is usual, or takes a receipt for them, or delivers them in such a manner as to furnish a remedy over against the wharfinger; but a delivery to the known agent or servant of the carrier or wharfinger will be sufficient.[2]

In the case of a sale of goods on an order from a distant customer, the delivery ought to be such as to charge the carrier for the goods. A tradesman at one port receiving an order to forward goods to a person at another port, by a common sea carrier, does not, as we have seen, sufficiently comply with the order by depositing the goods at the receiving house of such carrier, with directions to be forwarded to their place of destination, if the goods, being much above the value of five pounds, to which the carrier's liability was notoriously limited, be not specifically entered and paid for accordingly; for such tradesman has an implied authority, and it is his duty to pay any extra charge necessary to insure the responsibility of the carrier to the party from whom he receives the order, though only general in the terms of it; and in the case of non-delivery by the carrier, whose responsibility was lost for want of such special entry and payment, the vendor cannot recover the value of the goods against the person from whom he received the order.[3]

The liability of the carrier does not begin till the goods are delivered to him; but if he agree to carry the goods, such as bales of cotton, and by his order they are carted to the levee, he may be liable on his executory agreement for whatever damages ensue in consequence of such act; but though he give the order, if it is not obeyed he is not answerable for a loss of the goods caused by an inundation.[4]

If the carrier be also a warehouse-man who receives goods into his warehouse for storage until he is ordered to send the

[1] Fragano v. Long, 4 Barn. & Cres. R., 219.
[2] Buckman v. Levi, 3 Campb. R., 414.
[3] Clark v. Hutchins, 14 East, 475.
[4] Williams v. Peytavin, 4 Martin (Louis) R., 304.

same forward, he is not answerable as a carrier until his duty as a carrier begins[1] If he receives the goods merely as a forwarding merchant, having no interest in the line by which they are to be carried, he is responsible only for a faithful discharge of his duty to store and forward the goods by a responsible carrier.[2] So also, a carrier at the end of his route becomes a fowarder of such goods as have a more distant destination; as where a carrier on the Hudson river receives goods at New-York to be transported to Troy, from whence they are to go north by the canal to Granville; at Troy his duty as a carrier ceases, and he is there responsible only as a forwarder, bound to obey the instructions he has received from the owner in regard to the line or manner in which the goods are to be sent forward.[3]

If a carrier directs goods to be sent to a particular booking office, he is answerable for the negligence of the booking office keeper. And in an action against the carrier, the person at the booking office who delivered the goods to the carrier is a competent witness to prove the state in which they were delivered.[4] Plaintiff sent a parcel directed to a person in London, to the postmaster at Bradford, to be forwarded to Melksham; the postmaster received two-pence to book the parcel, and sent it by a mail cart to the King's Arms Inn at Melksham, and he was accustomed so to take in parcels for the mail cart; the innkeeper at Melksham booked the parcel for London, charging two-pence as booking for his own trouble, and also charging on the parcel the demand which he had paid for carriage from Bradford. He then forwarded the parcel by a mail-coach, of which the defendants were proprietors, to London; several coaches used to stop at the King's Arms; the mail pulled up there, but did not change horses; the innkeeper had no express authority from the defendants to take in parcels, and used his discretion

[1] White v. Humphrey, 11 Adolph. and Ellis R., 43.
[2] Brown v. Denison, 2 Wend., R., 593; Roberts v. Turner, 12 John R., 232.
[3] Ackley v. Kellogg, 8 Cowen R., 223.
[4] Colepepper v. Good, 5 Carr. and Payne R., 380.

in sending them by mail or any other coach; no regular booking office was kept at the King's Arms, and the parcel being lost, it was held that the King's Arms was a receiving house of the defendants, who were liable on a contract to carry from Melksham to London, and bound to deliver the goods according to their address.[1]

If the carrier actually receive an article for carriage, though not bound to receive it at the time or at the place or in the condition in which it is offered, he is responsible for it;[2] as where a greyhound was delivered to a carrier, who gave a receipt for it, and the greyhound being afterwards lost, it was held that the carrier could not set up as a defence that the dog was not properly secured when delivered to him. So, where a package was delivered to the agent of a stage-coach company, at the post-office where the stage was standing, and not at the office of the company, to be carried from Boston to Hartford, and was by the agent when he received it entered on the way bill, he having previously directed the person who had care of the package to bring it to the post-office, and the package being lost before reaching Hartford, it was adjudged that the owners of the coach were liable for the value of the package, the delivery at the post-office being with the assent of their agent, and that in the delivery of such a package for carriage, the person delivering it is under no obligation to state its value unless inquiry is made on the subject.[3]

Neither is the time material, where the carrier receives the goods. The defendants, an English railway company, who are carriers on their line, published a printed notice, which was fixed upon the door of the station for the reception of goods in Liverpool, that all goods received after four o'clock, P. M., would be forwarded on the next working day. Long after the publication of this notice, certain goods were brought to the station about half-past five, P. M., to be

[1] Sims v. Chaplin, 5 Adolph. and Ellis R., 634.

[2] Phillips v. Earle, 8 Pick. R., 182; Stuart v. Crowley, 2 Stark. R., 287; Pickford v. The Grand Junction Railway Company, 12 Mees. and Welsb. R., 766

[3] 8 Pick. R., 182.

forwarded to Birmingham by the railway. The person who brought them, a servant of the owner, saw the company's weigher and asked if there was time, i. e., for the goods to proceed that evening; he said there was, and the goods were placed by the company's porters on the trucks on which goods are carried by the railway. The same person had on former occasions taken goods of the same kind to the station at a later hour, which were never refused for being too late, and had been forwarded the same evening; and it was held that on these facts there was evidence to go to the jury of a special acceptance and contract by the railway company to forward the goods on the same evening.[1]

The manner in which a carrier receives goods for transportation, may enter into the contract so as to qualify his responsibility. Thus, the owner or master of a vessel is not liable for damage done to deck freight, arising from the the dangers and waves of the sea and the necessary exposure of the property on deck, where it has been stowed there by the consent of the shipper, or received to be carried in a particular manner and injured in consequence of that mode of carriage.[2] Except as to damages which result from its exposed situation, the carrier is bound by the usual obligation to carry safely; but in relation to underwriters without a special agreement, and other owners of the cargo under deck, and in cases of jettison, it is well settled that goods stowed on deck form no part of the cargo.[3]

The fact that an article goes in the carrier's conveyance, is not enough to render him responsible for it as a common carrier; as where a passenger in a railroad car placed his overcoat on a seat in which he sat, and forgot to take it with him when he left, and it was stolen.[4] By assuming to keep it in his own personal charge, he shows that he does not intend to hold the carrier answerable for it;[5] if he wishes

[1] 12 Mees. and Welsb. R., 766. The article in question consisted of fresh pork, which was injured by twenty-four hours' delay.

[2] Shackelford v. Wilcox, 9 Louis R., 33; 16 East, 245; 2 Stark. R., 324.

[3] 9 Louis R., 33; Beck v. Evans, 16 East, 245.

[4] Tower v. The Utica and Schenectady R. R. Co., 7 Hill R., 47.

[5] Jeremy's Law of Carriers, 55, 56.

to hold him liable, he must commit it into his custody; if he lose a package which he carries in his hand, or money from his purse, it is his own fault; and where his negligence conduces to the loss, the carrier is not responsible.[1] So, where the plaintiff received a parcel from his friend to book for London at the office of defendants, who were common carriers, and, instead of obeying his instructions, put the parcel into his bag, intending to take it to London himself, and the defendants having lost the bag, it was adjudged that the plaintiff could not recover damages from them in respect of the parcel.[2] The violation of trust, by depriving the carrier of his reward for the carriage of the parcel, was regarded as evidence that the plaintiff intended to make himself responsible for the safe delivery of the package; and as proof that it was not intrusted to the carriers.

A similar case has been decided in the same way in this state.[3] A passenger came on board of the steamboat Constellation at New-York, delivering to the master of the boat a trunk as his baggage, in which was deposited over eleven thousand dollars in bank-notes; the passenger spoke to the master of it as a trunk of importance, without mentioning what was in it, or paying any thing for its carriage separate from his fare to Newburgh. The bills were received by the passenger from the president of the Bank of America, in seven sealed packages, with the advice that he had better deliver them to the captain of the boat immediately on going aboard, which he considered as a direction to him, and placed the trunk in the office of the boat behind the door, as directed by a young man in it, who appeared to be doing business there; then went on shore a few minutes to buy some oranges, when on his return the trunk had disappeared; and the plaintiff, the Orange County Bank, which

[1] Whalley v. Wray, 3 Esp. R., 74; Gibbon v. Paynton, 4 Burr, 2299; Carth., 485.

[2] Miles v. Cattle, 6 Bing. R., 743.

[3] 9 Wend. R., 85; 4 Burr, 2298; 5 Com. L. R., 476; 8 Pick. R., 182; 4 Burr, 2301; Sewall v. Allen, 6 Wend. R., 335.

was the owner of the money, brought its action against the proprietors of the boat, seeking to charge them as common carriers; and it was held that this was not such a delivery of the packages of bills as to render the carrier responsible for them,[1] on the ground that when a carrier is to be made liable for bank-bills, not made up in a package pointing to its contents, common justice requires that he should be informed of the nature of his charge, so that he may take the necessary precautions for its safety and for his own protection.[2]

In like manner, it has been held that the owners of a steamboat are not liable for a part of a passenger's baggage, when separated from the rest; nor for the contents of a sealed letter or packet when stolen, which has been delivered to a passenger on board, at any place the boat may stop; and that a sealed letter with bank-notes inclosed, delivered by a passenger to the clerk of a steamboat for safe keeping, is simply a contract of deposit between *them*, in which the depositary is only responsible for ordinary care.[3] The reason of this decision is, that the carrier is not to be held responsible for goods or money which is not in fact intrusted to his custody for carriage.

It is often a nice question, but generally one of fact, whether or not there has been a delivery to the carrier. If it be a sufficient delivery, according to the usages of business, to leave goods on the dock by or near his boat; still this must be accompanied with express notice to the carrier. Otherwise he will not be answerable for them, unless it be shown that he subsequently received them into his charge.[4] The delivery to an agent, authorized by the carrier to receive goods for transportation, is of course a delivery to him.[5] In a case of sale, where goods are ordered or purchased, with directions to be shipped to a distant place, it is incum-

[1] 9 Wend. R., 85; 5 Com. L. R., 476; 4 Burr, 3301; Sewall v. Allen, 6 Wend. R., 335.

[2] 9 Wend. R., 87. The charge of the circuit judge was sustained.

[3] Wilcox & Fearn v. Steamboat Philadelphia, 9 Louis R., 80.

[4] Packard v. Getman, 6 Cowen R., 757.

[5] Anjon v. Deagle, 3 Har. and Johns. R., 206.

bent on the vendor to make such a delivery as will furnish the purchaser a remedy against the carrier.[1]

Responsibility of Carriers.

By the general custom, or as it is termed in England, the custom of the realm, which is the foundation of the common law on the subject, the common carrier intrusted with goods for carriage, is responsible at all events for every injury, arising in any other way than by the act of God or of public enemies.[2] His responsibility is established with a view to public policy, to the reward which he receives, to his character as an insurer, and to the terms of his contract, express or implied.[3]

Under the rule applicable to other bailees for hire, the carrier would be responsible only for ordinary neglect; and it seems to have been held in the reign of Henry the Eighth, that a common carrier was chargeable in case of a loss by robbery, only when he had traveled by ways dangerous for robbing, or driven by night, or at any inconvenient hour; but in the commercial reign of Elizabeth, it was resolved upon the same broad principle of policy and convenience that have been mentioned in the case of innholders, that if a common carrier be robbed of the goods delivered to him, he shall answer for the value of them.[4] This politic rule was afterwards rendered still more stringent, until it became settled that the carrier must answer for all losses, not caused by the act of God or the king's enemies.[5] These exceptions are in truth part of the rule itself.

The first inquiry is, what in a legal sense is meant by the act of God? It has been proposed to substitute in place of these terms, the words *inevitable accident*, as more reverent and decent, to express the same idea.[6] Whatever we may

[1] Buckman v. Levi, 3 Campb. R., 414.
[2] Coggs v. Bernard, 2 Ld. Raym., 919; Dale v. Hall, 1 Wils. R., 181.
[3] Jeremy on Law of Carriers, 31 to 38.
[4] Jones on Bailm., 103.
[5] Mors v. Slue, Raym., 220; 1 Vent., 190, 238; 6 John. R., 160.
[6] Jones on Bailm., 105.

think of the taste which rejects the standard language of the law, because it is deemed derogatory to the dignity and sublimity of the doctrine, that "not a gust of wind blows, nor a flash of lightning gleams, without the knowledge and guidance of a superintending mind;" it is clear that the act of God means something quite different from what is expressed by the terms, inevitable accident, as these are ordinarily used. In fact, the carrier has been held answerable for losses caused by accidents, which were to him entirely inevitable.[1]

Where the carrier is plundered on his way by a band of robbers, the accident is to him inevitable enough; but he must nevertheless answer for a loss by robbery. In Smith v. Shepherd, the loss happened at the entrance of the harbor of Hull. Just before the defendant's vessel reached the place, a bank there, formerly shelving, had been rendered precipitous by a great flood, where a vessel sunk by getting on the bank, having a floating mast tied to her. The defendant's vessel striking the mast, was forced towards the bank, where, owing to a change in the bank occasioned by the flood, the loss happened. The natural cause, the act of God in changing the bank, was laid out of the question, as not being the immediate cause, and therefore furnishing no excuse. The fastening of the mast, if not the sinking of the ship to which it was attached, were the only remaining causes, and one, if not both, were obstructions placed there by human agency. Evidence being offered to show that there had been no actual negligence on the side of the defendant, it was overruled at the circuit, and a verdict found for the plaintiffs, which was sustained by the court.[2]

Where the carrier's vessel sunk by driving against a concealed anchor in the river, which belonged to a barge lying near by, but the bargeman did not, as he should have done, place a buoy to apprise others where his anchor lay, it was adjudged that the carrier could not excuse himself by showing the misconduct or neglect of another, the bargeman.[3]

[1] Abb on Shipp., part 3, ch. 4, § 1; 1 Term R., 34; 3 Esp. R., 127.

[2] 21 Wend. R., 196.

[3] The Trent Navigation Co. v. Wood, 3 Esp. R., 127.

McArthur v. Sears, was an action on the case for the loss of a quantity of oysters shipped at Buffalo for Detroit. The disaster occasioning the loss, happened under these circumstances: it was night when the vessel approached the harbor of Erie, the weather was hazy, with flurries of snow. The beacon light on the end of the pier was seen occasionally through the flurries of snow. Besides the beacon light, there was usually a light at the window of the house of the keeper of the beacon ilght, bearing west, southeast about fifty rods distant from the beacon light, and the usual way of steering into the channel was to bring the beacon light and the light in the keeper's house into a range, and take them as a guide in entering the harbor. A light was observed, which was supposed to be the light in the keeper's house, but which proved to be a light on board another steamboat, the North America, which had been driven ashore in a previous gale, and in navigating the vessel so as to bring in a range the two lights, that is, the beacon light and the light on board the North America, which was mistaken for the light in the keeper's house, the boat struck and got on a shoal; the wind blew hard, the sea ran high and the vessel labored, strained and pounded very hard, which made it necessary to throw the oysters overboard to save the vessel and cargo; and it was held that this loss did not occur by the act of God, so as to excuse the carrier.[1]

From these cases it is apparent that where the loss happens in any way through the agency of man, it cannot be considered the act of God.[2] Though the accident be inevitable, it is not the *vis major*, if it occur in any manner through human agency, as by the fault or negligence of man.[3]

To consider the rule affirmatively, according to Lord Mansfield, the act of God is a natural necessity, something in opposition to the act of man; something that could not

[1] 21 Wend. R., 190.

[2] 3 Esp. R., 127; Forward v. Pittard, 1 Term. R., 27; Campbell v. Morse, 1 Harp. Law Rep., 468; 10 John. R., 11; Robertson v. Kennedy, 2 Dana R., 430; Gordon v. Buchanan, 5 Yerg. R., 82; 7 id., 340.

[3] Amies v. Stevens, 1 Str., 128; 1 Term R., 27.

happen by the intervention of man, as storms, lightning and tempests.[1] In other words, these terms denote such inevitable accident, resulting from natural causes, as cannot be prevented by human care, skill and foresight.[2] For example, a sudden gust of the wind, by which the hoy of a carrier, shooting a bridge, was driven against a pier and overset by the violence of the shock, has been adjudged to be the act of God, or *vis divina*.[3] And so, where a vessel was beating up the Hudson, against a light and variable wind, and being near shore while changing her tack, the wind suddenly failed, in consequence of which she ran aground and sunk; it was held that the sudden failure of the wind was the act of God, and excused the master, there being no negligence on his part.[4]

The opinion delivered by Chief Justice Spencer, in the case referred to, has been criticised as bad law, though very fair divinity; but the whole force of the criticism consists in the misapprehension of a material fact, in the assumption that there was negligence in coming so near the shore under a light and variable wind, which was expressly negatived by the finding of the jury.[5] The sudden gust, in the case of the hoyman, drove his boat against the pier, and the sudden failure of the wind threw the vessel, then under a certain momentum, upon the shore; and these accidents, say the court, are equally to be considered the acts of God. He caused the gust to blow in the one case, and in the other the wind was stayed by him.

In like manner the freezing of our rivers is such an intervention of the *vis major* as excuses the delay of the common carrier by water; but he is bound to exercise ordinary forecast in anticipating the obstruction; must use the proper means to overcome it, and exercise due diligence to accomplish the transportation he has undertaken, as soon as the

[1] 3 Esp. R., 127; 1 Term R., 27.
[2] McHenry v. Railroad Co., 4 Harring. (Del.) R., 448.
[3] 1 Stra. R., 128.
[4] Colt v. M'Mechen, 6 John. R., 160.
[5] 6 John. R., 164; Smith's Leading Cases, 233, Am. ed., 1847.

obstruction ceases to operate, and in the meantime must not be guilty of negligence in the care of the property.[1] In another case it is adjudged, that where a carrier on the canals is prevented by their freezing from accomplishing the whole voyage, he is bound to deliver the goods at the place to which he undertook to transport them, on the canal again becoming navigable; but if the owner of the goods accepts them at the place where the voyage was interrupted by the ice, the carrier is discharged from further responsibility, and becomes entitled to a *pro rata* compensation for the transportation of the goods to that place. The freezing of the canal, rendering it impossible for a boat to proceed, is an act of God, for which the carrier is in no manner responsible.[2]

Such an act, however, does not relieve the carrier from his responsibility for the safe custody and final delivery of the goods at their place of destination, unless of its own force it works a total destruction or an injury of them, in defiance of human power and skill.[3] For, though the injury or loss proceeds directly from irresistible, natural causes, it cannot be attributed to the act of God, in any case where it might have been avoided by human prudence and foresight. If the act or negligence of man enters into the cause of the disaster, or contributes to bring or leave the goods committed to the carrier under the operation of natural causes that work their destruction, he must answer for them.[4]

To illustrate; where damage was done to a cargo by water escaping through the pipe of a steam-boiler, in consequence of the pipe having been cracked by frost, it was held that this was not the act of God, but negligence in the captain, in filling his boiler before the time for heating it, although it was the practice to fill over night when the vessel started in the morning.[5] So, where the wagon of the defendant, who was a common carrier, in which he was

[1] Bowman v. Teall, 23 Wend. R., 306.
[2] Parson v. Hardy, 14 Wend. R., 215.
[3] 23 Wend. R., 306; 14 id., 215.
[4] Williams v. Grant, 1 Con. R., 487.
[5] Siordett v. Hall, 4 Bing. R., 607.

conveying goods for hire, stuck fast in fording a creek, and the water rising suddenly, damaged the goods, it was adjudged that the defendant was liable for the damage so occasioned: though the rising of the river was caused by the act of God, the placing of the goods in that situation was the act of man.[1] So also, a ferryman, who is a common carrier, is liable for whatever damages may be sustained by a passenger in consequence of his attempting to cross a swift stream, such as the Santee river, by his being driven down the current. As he has the right to judge when it is safe crossing, he is not permitted to allege the force of the current as an excuse for the injury caused by his misjudgment, or neglect of duty in the management of the boat.[2] A breach in the bank or locks of the canal, or the bad condition of the highway used by the carrier, or low water in the river on which the goods are to be conveyed, interrupting the navigation, will excuse a delay in the carriage of goods; but in the meanwhile the carrier is bound to keep the goods safely, and he is required to anticipate and provide against the usual and ordinary dangers of the way, such as freshets.[3]

Though the act of God, working the destruction of the goods, will excuse the carrier for their non-delivery, it does not leave him unharmed. If he accept goods to carry from one place to another, and on the way they are destroyed by a superior and irresistible force, he cannot recover a *pro rata* compensation for their carriage.[4] In such a case, the owner loses the goods and the carrier his freight. Thus, where a carier received a quantity of salt at Hartford to be conveyed to Haverhill by boat on the Connecticut river, and on the way, meeting the owner and anticipating obstructions to the navigation, was told by him that he must go by water as far as he could and then land the salt, and he accordingly proceeded to within thirteen miles of the place of destina-

[1] Campbell v. Morse, 1 Harp., S. C. R., 468.

[2] Cook v. Gourdin, 2 Nott and McCord R., 19.

[3] Wallace v. Vigus, 4 Blachf. R., 260; Boyle v. M'Laughlin, 4 Harris and Johns R., 291; Hand v. Baynes, 4 Wharton R., 204.

[4] Harris v. Rand, 4 N. Hamp. R., 259.

tion, where he was stopped by the ice and compelled to land the salt in a place, from which during the night following, the river being choked up by the ice, it was swept away by the current setting around in that direction; in an action for the freight to the place where the goods were destroyed by this inevitable accident, it was held that nothing could be recovered.[1] If the owner had accepted the goods at the place where they were landed, and taken them into his possession, the acceptance would have raised an implied promise to pay the freight to that point.[2]

The ground of this decision is that nothing is earned or due until the goods are delivered at the place of destination. A waiver of the contract, by an acceptance of the goods, or any other equivalent act, implies a promise to pay for their transportation *pro rata*.[3] So long as the contract remains in force and unexecuted, the rights of the parties are regulated by the terms of the shipment, usually expressed in the bill of lading.

The carrier cannot excuse himself by alleging a loss by inevitable accident where he has brought the goods into the danger by a deviation from the route prescribed by the terms of the contract for carriage.[4] The defendant, who was the owner of a line of vessels engaged in transporting goods from Philadelphia to Baltimore, received certain goods belonging to the plaintiff, on board of one of his vessels, and gave to the plaintiff a receipt for them to be carried by the way of the Chesapeake and Delaware canal, promising in the receipt to deliver the goods to the consignee at Baltimore, the dangers of the navigation, fire, leakage and breakage excepted; the vessel left Philadelphia, and on arriving at the mouth of the canal, the captain was informed that the locks were out of order, and that he could not be allowed to pass through the canal; he then proceeded down the bay and out to sea, with the intention of going round to Baltimore, but in a gale of wind

[1] 4 N. Hamp. R., 259.
[2] Shields v. Davis, 6 Taunt R., 65; Smyth v. Wright, 15 Barb. R., 51.
[3] Palmer v. Lorillard, 16 John. R., 348.
[4] Hand v. Baynes, 4 Wharton R., 204, Penn.

the vessel struck on a shoal, and with the cargo was totally lost; evidence was given on the trial that the goods had been purchased by the plaintiff, and there was no proof of property in the consignee; and the court held, first, that this was a contract to carry the goods to Baltimore through the canal; second, that the circumstances did not excuse a deviation from the route; third, that the clause in the receipt excepting the dangers of the navigation did not apply to the case of the canal being impassable by inevitable accident or otherwise; fourth, that the plaintiff could maintain the action against the carrier for the loss of the goods; and fifth, that the value of the goods was the measure of damages.[1]

The contract here being to carry by the canal, going around by the sea was a breach of it, and such a deviation from its terms as rendered the voyage more dangerous.[2] Such a temporary obstruction suspends the carrier's duty, but does not authorize a departure from the express terms of his contract.[3] It seems, however, that where there is a usage to go by another route, in cases of obstruction, so general and of so long standing as to be well known, the carrier will be justified in following the established course under similar circumstances; but where there is an express contract to carry by a given way, the stipulations of his special agreement will prevail over the usage.[4] If he proceed in spite of the danger, he must answer for the consequences; as where a vessel sails on a river obstructed by ice, which cuts the hull of the boat and causes it to leak, in consequence of which an injury happens to the cargo.[5]

It is sometimes asserted in the books that the act of God, inevitable accident, and dangers of the sea, are expressions of very similar legal import, excusing a loss whether excepted in the bill of lading or not.[6] But these terms are

[1] Wharton R., 204; Davis v. Garrett, 6 Bing. R., 716.
[2] 6 Term R., 750; Hadley v. Clark, 8 Term R., 259.
[3] 6 Term R., 750.
[4] 6 Term R., 750; Crosby v. Fitch, 12 Conn. R., 410.
[5] Richards v. Gilbert, 5 Day R., 415.
[6] 12 Conn. R., 410.

not exactly expressive of the same idea. The perils or dangers of the sea, arise in some instances from circumstances which cannot be attributed to the act of God, but are undoubtedly covered by a policy of insurance against the perils of the sea; as where it was held that the loss of a ship so insured by the sudden impressment of sailors sent on shore to fasten it, was a loss within the policy.[1]

Though the voyage be interrupted by an inevitable accident which arrests and detains the carrier's boat, whereby the cargo becomes damaged, the carrier may still be held liable for want of diligence and proper exertions in saving the goods; for it is his duty in this case to pursue such a line of conduct as a prudent man of intelligence would observe in taking care of his own property, similarly situated.[2] Where his vessel is sunk by running upon an unknown and concealed snag, the question, whether it is to be considered an inevitable accident or not, will depend upon this other question: Could it have been avoided by human foresight and prudence? If newly placed there by a flood, it it is as much the act of God as is the formation of a sandbar, or a change in the channel of the river, wrought by the same agency, and unknown to the carrier.[3] Whether or not the loss is to be attributed to inevitable necessity, not arising from the intervention of men, and which no human prudence could have avoided, is a question of fact for the jury to decide.[4]

Losses by fire, kindled by the lightning, are attributable to the act of God, provided the carrier has no power to save the property after the bolt has fallen, and before the goods have been burned.[5] He must answer for all losses by fire, casually kindled.[6]

[1] Hodgson v. Malcom, 5 Bos. and Pull. R., 336; 21 Wend. R., 198, 199.
[2] Faulkner v. Wright, 1 Rice R., 107.
[3] Story on Bailm., § 516.
[4] Elliott v. Rossell, 10 John. R., 1; 11 id., 107.
[5] Forward v. Pittard, 1 Term R., 33; 15 Conn. R., 539; 1 Rice R., 107.
[6] Steamboat Co. v. Bason, Harper (S. C.) R., 264.

Public enemies. The carrier is expressly exempted from liability for losses caused by public enemies; as by a hostile invasion and seizure or destruction of property, or by a capture of the carrier's vessel and cargo on the high seas, by the men of war or commissioned privateers of the nation with which we are in open war.[1] Rioters and robbers and thieves and insurrectionists, though at war with social order, are not in this case classed as public enemies. Though the force by which the carrier is plundered be never so great, as if an irresistible multitude of people should rob him, he is nevertheless chargeable.[2] Pirates, however, are deemed public enemies, the enemies indeed of the human race, to be seized and exterminated as wretches not fit to live.

And hence losses by piracy are included within the perils of the sea, and excused like other losses caused by an open and public enemy.[3] In times of war the commissioned vessels of the enemy are authorized to capture private as well as public property, which is carried into port within the jurisdiction of the captors, proceeded against as prize of war, in the courts of admiralty, and condemned; this process is held to divest the original owers of their property, and is the most frequent mode in which individuals are made to suffer from the calamities of war.[4] The mere act of seizing the property does not, either on sea or land, work a change of the title; to accomplish such a change, there must be a judgment of condemnation pronounced by a competent tribunal. This principle was considered in an interesting case tried in the county of Niagara, arising out of a transaction which occurred when the inhabitants were driven out of Lewiston during the war with England in 1813. The horse in question belonged to the United States, and was delivered by an officer to one St. John, a wagon-master; when the people were driven from the town, the horse

[1] 1 Term R., 33; 3 Esp. R., 127.

[2] Coggs v. Bernard, 2 Ld. Raym., 909; Jeremy on Carr., 31.

[3] Abbott on Shipp., p. 3, ch. 4, § 1, 2, 5th ed.

[4] Paige v. Lenox, 15 John. R., 173; Hudson v. Guestier, 4 Cranch. R., 293; 6 id., 281; 1 John. R., 479.

was taken from St. John by an Indian in the English service, who mounted him and pursued the plaintiff, with others, fleeing from the enemy; the plaintiff turning, shot the Indian who fell from his seat, and plaintiff shortly after took the horse and retained him; these facts it seems passed no title to the horse.[1] Such booty or plunder in a land war belongs to the sovereignty making war, no less than more substantial conquests. In respect to maritime captures, the judgment of a court is necessary to legalize the change of title, and relieve the captors from the charge of piracy.[2]

But it is not necessary for the carrier to show a change of the title; it is enough for him to show that the goods intrusted to him have been destroyed or wrested from him by the enemy of the state, those foreign enemies which are such by an open declaration of war.[3] Against all such, it is the duty of government to protect commerce, and shield its citizens from loss.[4] According to Sir William Jones, "the carrier is regularly answerable for neglect, but not regularly for damage occasioned by the attacks of *ruffians*, any more than for *hostile* violence or unavoidable misfortune; but the great maxims of policy and good government make it necessary to except from this rule the case of robbery, lest confederacy should be formed between carriers and desperate villains, with little or no chance of detection."[5] The rule is somewhat more stringent than it is here laid down; the presumptions in case of loss are all against the carrier, who must excuse himself by showing that the loss occurred through the act of God or of public enemies.[6] And everything is negligence in the carrier from the moment he receives the goods into his custody, which the law does not excuse.[7]

[1] Cook v. Howard, 13 John. R., 276; Goss v. Withers, 2 Burr R., 693.
[2] 13 John. R., 278; Doug. R., 614, note.
[3] Jeremy on Car., 31.
[4] 10 Met. (Mass.) R., 472; 2 Roll. Abr., 248.
[5] Jones on Bailm., 104.
[6] 1 Term R., 33; Bell v. Reed, 4 Bin. R., 127; 6 John. R., 160.
[7] Rich v. Kneeland, Hob., 18, and Cro. Jac., 330.

The carrier, receiving goods for transportation, must answer for them absolutely, unless received upon a special contract qualifying his liability, with the two exceptions we have mentioned. And the reason why these acts only are held not to charge carriers, seems to be, that as they are not under the control of the contracting party, they ought not to affect the contract, inasmuch as he only engages against those events which by possibility and due diligence he may prevent. These rules, though said to be founded in custom, have yet always been considered to be of common law.[1]

Another reason upon which the extraordinary liability of the carrier is founded, is in respect of the reward he receives; and not, as some seem to have thought, because he had a remedy over against the hundred.[2] The liability existed at common law long before that remedy was given by the Statute of Winton; and many cases were so decided previous thereto, on the ground of the reasonable premium to which he was entitled, and which at that time served as a criterion of the extent of such liability. Hence, in cases where the value of the goods delivered to him was fraudulently conceded, or misrepresented, it was considered that as his warranty and insurance were in respect of the reward which ought to be proportioned to the risk incurred, such fraud and concealment annulled the contract altogether, and relieved the carrier.[3]

A carrier is also considered in the nature of an insurer, and, like other insurers, may demand a premium proportioned to the hazards of his employment; he may therefore require the owner of goods to give such information as will enable him to decide on the proper amount of compensation for his services and risk, and the degree of care necessary to the discharge of the trust; and if the owner give an answer false in a material point, the carrier will be absolved from the consequences of a loss not occasioned by negligence or misconduct; but in such case actual notice of the require-

[1] Jeremy on Law of Car., 32.
[2] Gibbon v. Paynton, 4 Barr., 2299.
[3] Titchburne v. White, 1 Stra. R., 145; 4 Burr., 2298.

ments of the carrier must be brought home to the knowlegde of the owner of the goods. A general notice, posted up in the carrier's office and other places, is not sufficient to subject the owner to the charge of fraud. It seems that his only safe course is to announce his terms to every person who applies to him for the carriage of goods, stating them in a specific and plain manner.[1]

The exercise of a public employment is a tacit acknowledgment or assumption of all the duties belonging to that character;[2] and upon this ground, of his being an insurer, the carrier has been declared to be answerable even for inevitable accident. "If he make a greater warranty and insurance he will take greater care, use more caution, and be at the expense of more guards or other methods of security; and therefore he ought in reason and justice to have a greater reward."[3] Any concealment of the real extent of the risk to be run, or any artful misrepresentation by the owner of the goods used to mislead the carrier, which prevents him from taking adequate care of them, deservedly exempts him from responsibility.[4]

The extent of the carrier's liability does not depend on the terms of his contract; it is declared by law. His undertaking, when reduced to form, does not differ from that of any other person who may agree to carry goods from one place to another; and yet one who does not usually exercise this public employment, will incur no responsibility beyond that of an ordinary bailee for hire, and is not answerable for a loss by any means against which he could not have guarded by ordinary diligence. It is not the form of the contract, but the policy of the law, which determines the extent of the carrier's liability.[5] When he is charged as a carrier, it is on the ground of an obligation imposed upon

[1] Hollister v. Nowlen, 19 Wend. R., 234; Brooke v. Pickwick, 4 Bing. R., 218; Roberts v. Turner, 12 John. R., 232; 6 id., 160; 11 id., 107; 10 id., 1; 1 Esp. R., 36.

[2] Jeremy on Car., 34.

[3] Gibbon v. Paynton, 4 Burr., 2299.

[4] Jeremy on Car., 35; 19 Wend. R., 234.

[5] Per Bronson, J., in Hollister v. Nowlen, 19 Wend. R. 239.

him by the law.[1] In Forward v. Pittard, Lord Mansfield observes: "It appears from all the cases for a hundred years back, that there are events for which the carrier is liable independent of his contract. By the nature of his contract, he is liable for all due care and diligence; and for any negligence he is suable on his contract. But there is a further degree of responsibility by the custom of the realm, that is by the common law; a carrier is in the nature of an insurer."[2]

The law has indeed always recognized the existence of a contract, whilst it has at the same time declared the obligation of the carrier to be a public duty, by allowing the plaintiff to vary the form of his action according to the circumstances of the case, and for the greater convenience of the party injured.[3] It has also discountenanced and discouraged limitations of his liability by special agreements. The permitting him to be charged in contract, as well as in tort is founded on a clear principle of mutual equity; that there should be a consideration adequate to the risk on the one side, and due precaution and diligence exerted on the other.[4]

In every contract for the carriage of goods for hire, it is a part of the carrier's contract, implied by law, that he will provide proper carriages or vessels, in all respects adequate for the business or employment in which he is engaged.[5] His vessel must be seaworthy, and his carriage must be in good order and capable of performing the journey.[6] The mode of carriage, however, and the sufficiency of the vessel or carriage used by the carrier, become important subjects of inquiry only where there has been a special acceptance, or an agreement limiting or qualifying his liability. For, in general, he must answer for the goods intrusted to him, and deliver them safely at their place of destination, unless ex-

[1] Ansell v. Waterhouse, 2 Chitty R., 1.

[2] 1 Term R, 27; 1 Esp. R., 36.

[3] Boson v. Sandford, 1 Salk., 440; Buddle v. Wilson, 6 Term R., 369; Dickson v. Clifton, 2 Wilson, 319; Dale v. Hall, 1 Wills R., 282.

[4] Jeremy on Law of Car., 36.

[5] Lyon v. Mells, 5 East R., 428.

[6] Bell v. Reed, 4 Binn. R., 127; 1 Str., 128.

cused by showing a loss for which he is not responsible.[1] There being no special agreement, the law charges him with the safe custody of the goods as an insurer; and as he accepts them for transportation, he is bound to deliver them safely at the place to which they are addressed, provided it be on or at the end of his route.[2]

Special Contracts.

The question has been considerably discussed in this state, whether common carriers can, by special contract, restrict their liabilities for losses which occur otherwise than by the act of God or the public enemies. The old supreme court decided that they could not, and the New-York superior court has more recently held that they may, by an express, special contract, limit or restrict their common law liability as insurers for the safe transportation and delivery of goods intrusted to them;[3] but that public policy forbids that they should be permitted to exonerate themselves, even by an express contract, from a loss occasioned by their default or neglect of duty. This decision has been since affirmed by the court of appeals.

It has long been the practice of common carriers by water to insert in the receipt of the goods or bill of lading, an exception of the dangers or perils of the river, lakes and seas, and other casualties, such as fire, leakage and breakage; thus entering into a special agreement with the owner for the transportation of the goods, and leaving him to obtain an insurance upon them against the excepted dangers.[4] The effect of such a custom, supported by judicial decisions, is to permit the parties to separate the business of insuring from that of carrying goods, which, in a country so vast as ours, is thought to be for the convenience and advancement of commerce.[5] Since the decision by the supreme court of the United States,

[1] Story on Bailm., § 549.
[2] Dorr v. N. J. Steam Navigation Co., 4 Sand. R., 136.
[3] Gould v. Hill, 2 Hill R., 623; 4 Sand. R., 136.
[4] Merchants' Bank v. N. J. Steam Nav. Co., 6 Howard U. S. R., 344.
[5] 4 Sand. Superior Court R., 146.

that the carrier may by special contract limit his liability, the importance of uniformity between the courts of the State and Union, in the rules of law regulating commercial transactions, is deemed a strong argument in favor of its recognition with us.[1]

We have seen that the carrier, being a public servant, is obliged to accept and take charge of goods for carriage on his route and within his line of business, on being tendered a reasonable compensation.[2] This would be inconsistent with an absolute right on the part of the common carrier to impose such terms as would destroy the liability imposed upon him by law. In regard to the manner of receiving goods, booking, and paying for their transportation, the carrier has the right to regulate and prescribe his own terms; and if these are not complied with he cannot be held answerable.[3] But where these are complied with, he is bound by reason of his employment to receive and carry the goods tendered to him for carriage.

It follows that special agreements, made with carriers for the transportation of goods by land or water, are to be regarded as entered into for the mutual accommodation of the contracting parties. The rule of law is suspended in the particular case by a special contract.[4] A general notice by the carrier restricting his liability, though brought home to the knowledge of his employer, being simply an act of his own, will not discharge him from his legal liability.[5]

Public Notices. There is a class of cases in which effect has been given to public notices, published in such a manner as to bring them to the knowledge of the carrier's employer; such as notices that the carrier will not hold himself responsible

[1] Parsons v. Monteath, 13 Barb. R., 353.

[2] Doct. and Stud., 270; Jackson v. Rogers, 2 Show., 327; Lovett v. Hobbs, id., 127; 3 Hill R., 9; 7 id., 533; 2 Comst. R., 209.

[3] Anonymous v. Jackson, Peake's Add. N. P. Cas., 185.

[4] 4 Sand. R., 143.

[5] Hollister v. Nowlen, 19 Wend. R., 234; 1 Esp. R., 36.

for goods above a given sum, unless the same are entered and paid for in proportion to the risk, or unless the contents of packages are made known and a price paid for their insurance.[1] Such a notice has sometimes been treated as entering into and forming part of the contract, by the tacit acquiescence of the owner of goods, delivering them to the carrier with a knowledge of its terms.[2] But where under such notices the contents of boxes and packages have been concealed to lessen the carrier's reward, as where a package containing four hundred and fifty pounds was delivered, paid for and receipted as a package of two hundred pounds in money, the case has been treated as one of fraud; and the carrier has been held liable only to the extent of the money or goods for whose carriage he has been compensated.[3]

Where there was an acknowledged usage, and a special notice as to the price to be paid for the carriage of money, and the owner concealed a hundred pounds in an old nail bag, placed in the hay in the bottom of the coach, it was held that such fraudulent concealment discharged the carrier.[4] So, where a passenger by a coach, received from a friend a parcel to be delivered to the carrier, but instead of delivering it according to his instructions, placed it in his bag, intending to deliver it himself, and the bag was lost on the way by the carrier, it was adjudged that the carrier was not answerable for the parcel, since he had not been paid as he ought to have been for its carriage.[5]

It is evident that these cases do not turn upon the effect given to the notice, as a part of the contract; for the same rule is held wherever the carrier is deceived by the owner as to the contents of trunks or boxes delivered to him; as where a passenger delivers an ordinary traveling trunk as baggage, when it in fact contains a large sum of money.

[1] Clay v. Willan, 1 H. Bl., 298; Yate v. Willan, 2 East R., 128; Izett v. Mountain, 4 East R., 371; Nicholson v. Willan, 5 East R., 507.

[2] Jeremy on the Law of Car., 39.

[3] Tyly v. Morrice, Carth., 485.

[4] Gibbon v. Paynton, 4 Burr., 2298.

[5] Miles v. Cattle, 6 Bing. R., 743.

Though there be no notice, the rule is the same; if the carrier is deceived through the owner's fault, even without fraud, he is not answerable.[1]

The case of Pardee v. Drew illustrates the principle, and shows that where an imposition is practiced upon the carrier, it is immaterial whether it be developed by proving a notice or in any other manner. The defendant was the managing owner of the steamboat Utica, used in the transportation of passengers and their baggage between the cities of New-York and Albany, and the intermediate landing places on the river. Plaintiff took his passage at New-York for Catskill, and brought on board with him a trunk which was deposited among the baggage of the passengers, and lost before the arrival of the boat at Catskill. The plaintiff was a merchant residing at Delhi, in the county of Delaware, and had been in New-York purchasing goods; and on the day he took his passage, had sent off to the freight steamboats two boxes of goods to be transported to Catskill. He had made purchases of silks and other fine goods, of the value of about three hundred dollars, which he packed in the trunk, which was lost, and which contained nothing else; and the court decided that the carrier was not liable; that it was not material whether the plaintiff intended to impose upon the defendant, and under the cover of baggage obtain the transportation of merchandise free of expense, since that was the practical effect of his conduct; and that inasmuch as the defendant was deprived of his just reward for carrying the goods, and prevented from exercising proper precaution against the dangers to which the property was exposed, he was not liable.[2]

If there has been an unfair concealment, tending to throw the carrier off from his guard in the safe keeping of the goods, he is not chargeable.[3] In an English case it was left to the jury as a question of fact. A carrier had given notice that he would not be answerable for parcels of value unless

[1] Orange County Bank v. Brown, 9 Wend. R., 85.

[2] 25 Wend. R., 459

[3] Batson v. Donovan, 4 Barn. and Ald. R., 21.

entered and paid for as such, and the plaintiff, with a knowledge of this, delivered a parcel containing bank-notes to a large amount without informing the carrier of its contents. The coach in which the parcel was conveyed was left at midnight, standing for some time in the middle of a very wide street, with a porter who was ordered to watch it; during this time the parcel was stolen; at the trial two questions were left to the jury, first, whether the plaintiff had been guilty of any unfair concealment by not informing the carrier of the nature and value of the parcel, and secondly, whether the carrier had been guilty of gross negligence; and the charge was held correct.[1]

As a general rule, the owner is not bound to disclose the nature or value of the goods; but if he is inquired of by the carrier, he must answer truly.[2] If the carrier wishes to ascertain the extent of the risk assumed by him, he should inquire at the time the goods are delivered; and then if he is not answered truly he will have a defence.[3] But if the circumstances are such as to misrepresent the fact and deceive the carrier, the rule seems to be different; for this is equivalent to an affirmative misrepresentation, in its effects.[4]

There is another class of cases in which a carrier's notice, restricting his liability, has been regarded as entering into and forming a part of a special contract of acceptance. But such notices have not been treated with much favor. Abbott, C. J., in Marsh v. Horne, mentions two decisions in conformity with the opinion delivered in that case.[5] In that case, a common carrier gave public notice that he would not hold himself accountable for any parcel above the value of five pounds, if lost or damaged, unless the same were entered as such and paid for accordingly when delivered. A person who knew that the carrier had given this notice, delivered to him a parcel containing goods above the prescribed value, to be carried from L to B, and the carrier

[1] Barn. and Ald. R., 21.
[2] Phillips v. Earle, 8 Pick. R., 182.
[3] Brooke v. Pickwick, 4 Bing. R., 218.
[4] 25 Wend. R., 459.
[5] 5 Barn. and Cres. R., 322.

accepted them for that purpose; the price was not then paid, and the carrier knew that the parcel contained goods much exceeding the value of five pounds; the parcel being lost, it was adjudged that the carrier was not responsible.[1]

One of the cases cited by the court was that of Harris v. Packwood, the decision in which is to this effect: If a carrier gives notice that he will not be accountable for goods above the value of twenty pounds, unless entered and an insurance paid, over and above the price charged for carriage, according to their value, a person who enters silk exceeding the value of twenty pounds and does not pay the insurance, cannot recover any part of the value of the goods, if lost; although the price he agrees to pay for the carriage of the silk, is, on account of its superior value higher than the ordinary price charged for the carriage of bulky articles; and although the carrier does not prove that the loss happened by any of those accidents against which the law makes him an insurer. Mansfield, C. J., in giving his opinion says, with evident regret, "it seems that from the days of Aleyn down to this hour, the cases have again and again decided that the liability of a carrier may be so restrained."[2] In the other case cited, the plaintiff, a silversmith in Exter, brought an action on the case against the defendant as a common carrier, proprietor of a coach, to recover damages for the loss of a valuable parcel intrusted to the care of his servants to be conveyed from Exter to London; and it was held that notice by a carrier, that he will not be responsible for goods sent to be conveyed by his coach, unless paid for according to their value, is not defeated by proof that the book-keeper who received them might have inferred their value.[3]

[1] Marsh v. Horne, 5 Barn. and Cres. R., 322. The action was in assumpsit, decided in 1815.

[2] 3 Taunt. R., 264. This decision was made in 1810; the case quoted from Aleyn did not affirm, but recognized the doctrine.

[3] Levi v. Warterhouse, 1 Price R., 280, Exchequer. This case, decided in 1815, is at variance with Beck v. Evans, 16 East R., 244 and 3 Campb. R., 267.

Very nearly the reverse is held in Beck v. Evans, in an action on the case against the defendants as common carriers for so negligently carrying a cask of brandy that the greater part was lost. It appeared, that the wagoner was informed of the cask leaking, but never took any step to prevent it, although he stopped several hours at Birmingham and other places, and only took the cask out when he had other parcels to deliver. The principal ground of defence was a notice in these terms: "The proprietors of the London and Salop wagons give this public notice, that they will not be answerable for cash or any other goods of what kind or nature soever, above the value of five pounds, if lost, stolen or damaged, unless a special agreement is made, and an adequate premium paid, over and above the common carriage." And Le Blanc, J., said: "The exemption of carriers from general liability, by reason of notices of this sort, has been carried to the utmost extent, and cannot be supported on any other ground than this, that they shall not be held liable to a large amount when they only get a small reward for the carriage. They are therefore exempted from liability, when the goods are of a much larger value than, from a knowledge of their bulk or quality, they could probably guess them to be. But that cannot apply to goods of a large bulk and known quality, where the value must be obvious." On another branch of the case, it was observed that "if goods are confided to the carrier, and it is proved that he has misconducted himself, in not preforming a duty which, by his servant, he was bound to perform, that is such a misfeasance as, if the goods thereby become damaged, his notice will not protect him from."[1]

This and similar cases have been supposed to establish it as a principal of construction that, however general in its terms the carrier's notice may be, it is to be applied to such cases only, where the party undertaking has no other means of knowing of what nature or value the goods may be, but that which the law of contract affords him, in requiring a bona fide representation to be made at the time of delivery.

[1] Beck v. Evans, 16 East R., 244.

So that when the bulk or evident quality of the goods, sufficiently indicates the value and corresponding risk, the principle of exemption does not apply.[1] In other words, the legitimate use of the carrier's notice is to shield him from imposition by demanding that the contents of packages shall be made known, and their carriage and insurance paid for in proportion to the risk. Accordingly, in an action against a carrier for negligence in conveying a looking-glass, it appearing that the packing case was marked *glass*, and that on delivering it, the book-keeper was informed of its value and desired to charge what he pleased for it, but only sixpence booking was paid, and the defence being that the notice required such articles to be paid for as such when delivered, it was adjudged that, as the book-keeper knew the value, and was desired to charge what he pleased, the payment of the money was dispensed with, and the notice was unavailing.[2]

So far as the cases have proceeded on the ground of fraud, the courts have uniformly given effect to the carrier's notice.[3] As the carrier incurs a heavy responsibility, it is adjudged that he has a right to demand from the employer such information as will enable him to decide on the proper amount of compensation for his services and risk, and the degree of care he ought to bestow in discharging his trust; and that if the owner give an answer which is false in a material point, or refuse to answer truly when called upon, the carrier will be absolved from the consequences of any loss not occasioned by negligence or misconduct.[4]

The doctrine of exempting carriers from liability by notice was at one period carried to a very great length in the English courts, so far even as to permit the carrier to shield himself from responsibility for a loss occasioned by the negligent discharge of his duty. As, where one delivered goods of above five pounds value to common carriers to carry by

[1] Jeremy on Car., 48.

[2] Wilson v. Freeman, 3 Camp. R., 527.

[3] Hollister v. Nowlen, 19 Wend. R., 234; Cole v. Goodwin, id., 251. Per Mr. Justice Bronson, in Hollister v. Nowlen, 19 Wend. R., 244.

the mail-coach, paying no extra price, and by a public notice, which had before reached the owner, the carriers had declared they would not be accountable for any package above five pounds in value, unless insured and paid for accordingly, it was held that the goods having been sent by another coach and lost, the owner could recover nothing, though the loss happened by a negligent discharge of their duty.[1]

It has been frequently and distinctly held that the carrier cannot, either capriciously in a single instance, nor by public notice seen and read by his customer, nor even by special agreement, exonerate himself from the consequences of gross neglect.[2] And the prevailing current of authorities goes to establish the doctrine that he cannot by any notice exempt himself from responsibility for losses caused by his neglect.[3]

A contrary doctrine has occasionally been held. The case of Leeson v. Holt, tried in 1816, shows the tendency of the decisions at that period, while it recognizes them as innovations commencing in the latter part of the last century.[4] The defendants, as common carriers, received at London a number of chairs to be conveyed to the plaintiff at Nottingham; the defence relied upon a notice painted upon canvass in large letters, and published in the Gazette and Times, newspapers, intimating that certain packages and goods, including household furniture, were to be at the risk of the owners; the proof of the publication in the newspapers was admitted on its being shown that the person delivering the chairs occasionally read them; Lord Ellenborough, in submitting the cause to the jury, said: "If this action had been brought twenty years ago, the defendant would have been liable, since by the common law a carrier is liable in all cases except two, where the loss is occasioned by the act of God, or by the king's enemies using an overwhelming

[1] Nicholson v. Willan, 5 East R., 507, decided in 1804.

[2] Riley v. Horne, 5 Bing. R., 217; 2 Moor and Payne R., 331, 341; Sleat v. Fagg, 5 Barn. and Ald., 342; Wright v. Snell, id., 350; Bickett v. Willan, 2 Barn. and Ald., 356; 3 Campb. R., 267; 16 East R., 244; Bodenham v. Bennett, 4 Price R., 31.

[3] Hyde v. Trent and Mersey Navigation Co., 1 Esp. 36; 4 Sand. R., 136.

[4] 1 Stark. R., 148.

force, which persons with ordinary means of resistance cannot guard against. It was found that the common law imposed upon carriers a liability of ruinous extent, and in consequence qualifications and limitations of that liability have been introduced from time to time, till, as in the present case, they seem to have excluded all responsibility whatsoever, so that under the terms of the present notice if a servant of the carrier had in the most willful and wanton manner destroyed the furniture intrusted to them, the principals would not have been liable. If the parties in the present case have so contracted, the plaintiff must abide by the agreement, and he must be taken to have so contracted if he chooses to send his goods to be carried after notice of the conditions. The question then is, whether there was a special contract. If the carriers notified their terms to the person bringing the goods by an advertisement, which, in all probability, must have attracted the attention of the person who brought the goods, they were delivered upon those terms; but the question in these cases always is, whether the delivery was upon a special contract." There was a verdict for the plaintiff on the ground of a want of notice.

Lord Kenyon, C. J., in Hyde v. Proprietors of the Trent and Mersey Navigation, A. D. 1793, had used these words:[1] "There is a difference where a man is chargeable by law generally, and when on his own contract. Where a man is bound to any duty, and chargeable to a certain extent by operation of law, in such case, he cannot by any act of his own discharge himself, as in the case of common carriers, who are liable by law in all cases of losses, except those arising from the act of God or of the king's enemies; they cannot discharge themselves from losses happening under these circumstances by any act of their own, as by giving notice for example to that effect. But the case is otherwise where a man is chargeable on his own contract. There he may qualify it as he thinks fit."

The next year after the trial of Leeson v. Holt, it was held that in an action of assumpsit against a carrier, evidence to

[1] 1 Esp. R., 36.

prove negligence was admissible, and that a gross neglect would defeat the usual notice given by carriers for the purpose of limiting their responsibility. And Burrough, J., observed: "The doctrine of notice was never known until the case of Forward v. Pittard, which I argued many years ago. Notice does not constitute a special contract; if it did, it must be shown on the record; it only arises in defence of the carrier; and here it is rebutted by proof of positive negligence. I lament that the doctrine of notice was ever introduced into Westminster Hall."[1]

From this time the rule of liability began to be held a little more strictly against the common carrier. Where there was the usual notice that the carriers would not be responsible for any package containing specified articles, or which with its contents should exceed five pounds in value, if lost or damaged, unless an insurance was paid, and a parcel exceeding the specified value was delivered to A and B, carriers and proprietors of a mail-coach, carried a short distance, and then delivered to a coach owned by A, and lost, it was adjudged that the carriers were responsible, notwithstanding the notice for the parcel in question, in consequence of their having delivered it to be carried by another coach.[2] And Mr. Justice Best remarked: "I am of opinion, that by the common law a carrier is answerable for the negligence as well as the misfeasance of his servants. The case of Nicholson v. Willan, which has been so strongly pressed in argument, is not an authority in favor of the defendant; but if it were, I think the authority of that case is considerably shaken by the case of Bickett v. Willan, where the decision of the court proceeded expressly on the ground that the carrier was liable for gross negligence. I am of opinion that by these notices the carrier is only protected from that responsibility which belongs to him as an insurer; that is a principle which all mankind can understand; and I think that we

[1] Smith v. Horne, 8 Taunt. R., 144, decided in 1818; Forward v. Pittard was decided in 1785, but did not involve the point.

[2] Garnett v. Willan, 5 Barn. and Ald. R., 53, decided in 1821, discrediting several preceding cases.

ought, in such cases as these, to lay down rules which may be easily comprehended by the great body of the public."[1]

A late decision of the superior court of the city of New-York, already quoted, permits the common carrier, by a special contract, but not by a mere notice, to limit his common law liability as an insurer.[2] The carrier's notice, though brought home to his employer, does not raise an implied contract, conformable to its terms.

The English decisions, while giving effect to the carrier's notice in respect to parcels prior to their statute law, enacted in 1830, required that the notice should be brought home to the actual knowledge of the employer; and that the fact of his being made acquainted with the notice should be established affirmatively by the finding of the jury.[3] In one case Mr. Justice Best observes:[4] "If coach proprietors wish honestly to limit their responsibility, they ought to announce their terms to every individual who applies at their office, and at the same time to place in his hands a printed paper, specifying the precise extent of their engagement. If they omit to do this, they attract customers under the confidence inspired by the extensive liability which the common law imposes on carriers, and then endeavor to elude that liability by some limitation which they have not been at the pains to make known to the individual who has trusted them. The merely putting up a board in their office ought not to satisfy a jury that they have been at the pains to make a customer understand beforehand the limitation under which, after a loss, they seek to elude their general responsibility."

The same justice, in another case, thus sums up the rights and duties incident to this employment: "That a carrier is an insurer of the goods that he carries; that he is obliged for a reasonable reward to carry any goods that are offered to him, to the place to which he professes to carry goods, if

[1] Garnett v. Willan, 5 Barn. and Ald. R., 53.

[2] 4 Sand. R., 136. Affirmed by Appellate Court.

[3] Brooke v. Pickwick, 4 Bing. R., 222; Rowley v. Horne, 3 Bing. R., 2; Griffiths v. Lee, 1 Car. and Payne R., 110.

[4] 4 Bing. R., 222, decided in 1827.

his carriage will hold them and he is informed of their quality and value; that he is not obliged to take a package, the owner of which will not inform him what are its contents, and of what value they are; that if he do not ask for this information, or if, when he asks and is not answered, he still takes the goods, he is answerable for their amount, whatever they may be; that he may limit his responsibility as an insurer by notice."[1]

The variety of notices given by the carrier, the difficulty in each case of proving that his employer saw the notice, with a multitude of modifying circumstances continually arising, at length threw the English decisions into endless confusion,[2] and induced the passage of the carriers' act, entitled, "An act for the more effectual protection of mail-coach contractors, stage-coach proprietors, and other common carriers for hire, against the loss of, or injury to parcels or packages delivered to them for conveyance or custody, the value and contents of which shall not be declared to them by the owners thereof."[3] The preamble to this statute recites the frequent practice of bankers and others to send by common carriers for hire by land packages and parcels containing money, bills, notes, jewelry and other articles of great value in small compass, without notifying the carriers of the value and contents of such parcels, and also the difficulty of fixing parties with the knowledge of notices published by them with intent to limit their responsibility, thereby exposing them to great and unavoidable risks. As this act may be fairly taken to be the best evidence of what the law was at the time of its passage, it is an important object of attention.[4] The exigency demanding its passage is

[1] 2 Moore and Payne, 341, 2.

[2] Jeremy on Car., 39 to 51.

[3] This statute of 1st William IV., ch. 68, was passed July 23d, 1830.

[4] Section 1 enacts: "That from and after the passing of this act, no mail contractors, stage-coach proprietors, or other common carrier by land for hire, shall be liable for the loss of or injury to any article or articles or property of the descriptions following; that is to say, gold or silver coin of this realm or of any foreign state, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewelry, watches, clocks or time-pieces of any description,

well shown in the opinion of the court delivered in Riley v. Horne:[1] "As the law makes the carrier an insurer, and as

trinkets, bills, notes of the governor and company of the banks of England, Scotland and Ireland respectively, or of any other bank in Great Britain or Ireland, orders, notes and securities for the payment of money, English or foreign; stamps, maps, writings, title deeds, paintings, engravings, gold or silver plate, or plated goods, glass, china, silk in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials, furs or lace, or any of them, contained in the parcel or package which shall have been delivered, either to be carried for hire or to accompany the person of any passenger in any mail or stage-coach or other public conveyance, when the value of such article or articles, or property aforesaid contained in such parcel or package, shall exceed the sum of ten pounds, unless at the time of the delivery thereof at the office, warehouse, or receiving house of such mail contractor, stage-coach proprietor, or other common carrier, or to his, her or their book-keeper, coachman, or other servant, for the purpose of being carried, or of accompanying the person of any passenger as aforesaid, the value and nature of such article or articles or property, shall have been declared by the person or persons sending or delivering the same, and such increased charge as hereinafter mentioned, or an engagement to pay the same be accepted by the person receiving such parcel or package."

§ 2. This section permits the carrier, whenever any such parcel or package exceeding ten pounds in value shall be delivered and its contents made known, to demand an increased compensation for the greater risk he runs in the conveyance of such valuable articles; his prices to be regulated by a notice to be posted in his office, by which both parties are to be bound.

§ 3. Provides that the carrier shall give a receipt for the package or parcel as insured, and that if he refuse to give the receipt, he shall refund the insurance money and be liable as at common law.

§ 4. Provides that in respect to all articles not enumerated in the act, the carrier shall be liable for their safe carriage as at common law, and for them also where they are insured; that no notice shall be deemed or construed to limit, or in any way affect the carrier's liability at common law.

§ 5. That all receiving houses shall be deemed those of the carrier, and that any one of a company of carriers may be sued separately.

§ 6. This act shall not annul or affect any special contract made by the carrier for the conveyance of goods and merchandise.

§ 7. If any parcel or package delivered to the carrier, its value and contents being declared and the increased rate paid thereon as insurance, be lost, the owner recovers the value of the parcel with the insurance money paid thereon.

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[1] 2 Moore and Payne R., 341, and 5 Bing. R., 217. This case was decided in November, 1828, about eighteen months before the passage of the act, by which, says Mr. Justice Bronson, the whole doctrine which had sprung up under notices, is cut up by the roots; and in such language as renders it apparent that the legislature deemed it an innovation on the common law of the land. (19 Wend., R., 249, 250.)

the goods he carries may be injured or destroyed by many accidents, against which no care on the part of the carrier can protect them, he is as much entitled to be paid a premium for his insurance of their delivery at the place of their destination, as for the labor and expense of carrying them there. Indeed, besides the risk that he runs, his attention becomes more anxious, and his journey more expensive, in proportion to the value of his load. If he has things of great value contained in such small packages as to be objects of theft or embezzlement, a strong and more vigilant guard is required, than when he carries articles not easily removed, and which offer less temptation to dishonesty. He must take what is offered to him, to carry to the place to which he undertakes to carry goods, if he has room for it in his carriage. The loss of one single package might ruin him. By means of negotiable bills, immense value is now compressed into a very small compass. Parcels containing these bills are continually sent by common carriers. As the law compels carriers to undertake for the security of what they carry, it would be most unjust, if it did not afford them the means of knowing the extent of their risk. Other insurers, whether they divide the risk, which they generally do, amongst several different persons, or one insurer undertakes for the insurance of the whole, always have the amount of what they are to answer for specified in the policy of insurance."

The preamble to the statute referred to recites in substance this very argument in favor of its provisions, and the act re-

§ 8. Nothing in this act shall be deemed to protect the carrier for hire from his liability to answer for loss or injury to any goods or articles arising from the felonious act of his servant; nor to protect the servant from liability for loss or injury by his personal neglect or misconduct.

§ 9. In a case of loss of articles delivered to the carrier and insured, their actual value, and not the value put upon them on their delivery, is to be the measure of damages; and the owner of them shall make proof of their value, if so required; but the recovery shall not exceed their declared value.

§ 10. The carrier may in all cases pay money into court, as in other actions, and with the same effect.

§ 11. This is a public act to be judicially taken notice of, without being specially pleaded.

quires the specified articles of great value in small compass, to be delivered and paid for as such, without any notice or special inquiry from the carrier. But though under the terms of this act the carrier is relieved from responsibility for parcels and packages of the articles named, unless their value and contents are declared in the act of delivery and a proper compensation paid for their carriage, it is to be observed that his duties in other respects remain unaltered. He is bound now as heretofore, to accept and carry goods when tendered to him; and where, since the act, a declaration against him in case for refusing to carry goods, averred that the plaintiff "was ready and willing, and then offered to pay to the defendant such sum of money as the defendant was legally entitled to receive for the receipt, carriage and conveyance of the said parcel," it was held on special demurrer that the averment was sufficient, and that it was not necessary to aver an actual tender of the money for the carriage.[1]

A common carrier, however, is not bound to convey goods except on payment of the full price for the carriage, according to their value; and if that be not paid, it is competent to him to limit his liability by special contract. And, therefore, where a carrier receives valuable goods to carry, after notice to the bailor that he will not be responsible for loss or damage to them unless a higher than the ordinary rate of insurance be paid for the carriage, he receives them on the terms of such notice, which amounts to a special contract. But he is not exempted thereby from all responsibility; but is, notwithstanding the notice, bound to take ordinary care in the carriage of the goods, and is liable, not only for any act which amounts to a total abandonment of his character of a carrier, or for willful negligence, but also for a conversion by a misdelivery arising from inadvertance or mistake, if such inadvertance or mistake might have been avoided by the exercise of ordinary care.[2]

[1] Pickford v. The Grand Junction Railway Company, 8 Mees. and Welsb. R., 372, decided in 1841.

[2] Wyld v. Pickford, 8 Mees. and Welsb. R., 443, decided in 1841, relative to a parcel of maps, being one of the enumerated articles.

The carrier is expressly permitted to make a special contract for the conveyance of goods and merchandises.[1] But no public notice is to be deemed or construed to limit or affect the carrier's liability at common law, who is made answerable as by the general custom for the loss of, or injury to any articles and goods in respect whereof he is not entitled to the benefit of the act.[2]

The general current of English decisions in regard to notices, in cases where there were no circumstances of concealment or fraud practiced on the carrier, has been to restrain and limit their effect. This is apparent from the terms of the statute, as well as from the well established rule of evidence, requiring the notice to be brought home to the actual knowledge of the employer.[3]

The general opinion in this country seems to be that carriers may limit their responsibility by notice, clear, explicit and consistent in its terms, and previously brought home to the actual knowledge of the bailor.[4] But it has been controverted in this state, and in at least one case distinctly adjudged that he cannot evade his common law liability even by an express contract.[5] In Pennsylvania the doctrine has been recognized, while at the same time the opinion has been expressed that they cannot by any special notice or agreement free themselves from *all* responsibility, particularly where there is gross negligence or fraud, or want of ordinary care.[6] In several other states, the rule of liability has been enforced with a strictness equal to the decisions in this state.[7]

In Hollister v. Nowlen, it is decided that stage-coach proprietors are answerable as common carriers for the baggage

[1] See section six of the act.

[2] Section four.

[3] 4 Bing. R., 222; 3 Bing. R., 2.

[4] 2 Kent's Comm., 606; Story on Bailm., § 549.

[5] Gould v. Hill, 2 Hill R., 623.

[6] Beekman and Johnson v. Shonse, 5 Rawle R., 179, decided in 1835; Atwood v. Reliance Trans. Co., 9 Watts (Penn.) R., 87; Brigham v. Rogers, 6 Watts and Serg. (Penn.) R., 495.

[7] Jones v. Voorhees, 10 Ohio R., 145; Fish v. Ross, 2 Kell. (Geo.) R., 349; 10 N. Hamp. R., 487; 10 Met. (Mass.) R., 479.

of passengers; that they are regarded as insurers and must answer for any loss not occasioned by inevitable accident or the public enemies; that the fact that the owner is present, or sends his servant to look after the property, does not alter the case, where there is no fraud on the part of the owner; that stage-coach proprietors and other common carriers cannot restrict their common law liability, by a general notice that the "baggage of passengers is at the risk of the owners;" and that if a carrier can restrict his common law liability, it can only be by an express contract, since a contract cannot be implied or inferred from a general notice, though brought home to the knowledge of the owner of the property. In delivering the opinion in this case, Mr. Justice Bronson remarked: "The doctrine of notice was not received in Westminster Hall without much doubt; and although it ultimately obtained something like a firm footing, many of the English judges have expressed their regret that it was ever sanctioned by the courts. Departing as it did from the simplicity and certainty of the common law rule, it proved one of the most fruitful sources of legal controversy which has existed in modern times. When it was once settled that a carrier might restrict his liability by a notice brought home to his employer, a multitude of questions sprung up in the courts which no human foresight could have anticipated. Each carrier adopted such a form of notice as he thought best calculated to shield himself from responsibility without the loss of employment; and the legal effect of each particular form of notice could only be settled by judicial decision. Whether one who had given notice that he would not be answerable for goods beyond a certain value unless specially entered and paid for, was liable in case of loss to the extent of the value mentioned in the notice, or was discharged altogether; whether, notwithstanding the notice, he was liable for a loss by negligence, and if so, what degree of negligence would charge him; what should be sufficient evidence that the notice came to the knowledge of the employer, whether it should be left to the jury to presume that he saw it in a newspaper which he was

accustomed to read, or observed it posted up in the office where the carrier transacted his business; and then whether it was painted in large or small letters, and whether the owner went himself or sent his servant with the goods, and whether the servant could read; these, and many other questions were debated in the courts, while the public suffered an almost incalculable injury in consequence of the doubt and uncertainty which hung over this important branch of the law."[1].

In another connection the same judge remarks: "But conceding that there may be a special contract for a restricted liability, such a contract cannot, I think, be inferred from a general notice brought home to the employer. The argument is, that where a party delivers goods to be carried after seeing a notice that the carrier intends to limit his responsibility, his assent to the terms of the notice may be implied. But this argument entirely overlooks a very important consideration. Notwithstanding the notice, the owner has a right to insist that the carrier shall receive the goods subject to all the responsibilities incident to his employment. If the delivery of the goods under such circumstances authorizes an implication of any kind, the presumption is as strong, to say the least, that the owner intended to insist on his legal rights, as it is that he was willing to yield to the wishes of the carrier. If a coat be ordered from a mechanic after he has given the customer notice that he will not furnish the article at a less price than one hundred dollars, the assent of the customer to pay that sum, though it be double the value, may perhaps be implied; but if the mechanic had been under a legal obligation, not only to furnish the coat, but to do so at a reasonable price, no such implication could arise. Now the carrier is under a legal obligation to receive and convey the goods safely, or answer for the loss. He has no right to prescribe any other terms; and a notice can at the most only amount to a proposal for a special contract, which requires the assent of the other

[1] 19 Wend. R., 234.

party. Putting the matter in the most favorable light for the carrier, the mere delivery of goods after seeing a notice, cannot warrant a stronger presumption that the owner intended to assent to a restricted liability on the part of the carrier, than it does that he intended to insist on the liabilities imposed by law; and a special contract cannot be implied where there is such an equipoise of probabilities."[1]

Giving effect to a general public notice, as a ground of presuming a special contract, is subject to this further objection, that it changes the burden of proof, and compels the employer to go beyond the delivery and loss of the goods, and prove that he did not assent to the terms of the notice, or that the loss happened through misfeasance or negligence, from which the carrier is not protected.[2]

The same doctrine has been held in the supreme court of the United States, in these words: "But admitting the right thus to restrict his obligation (by special contract), it by no means follows that he can do so by any act of his own. He is in the exercise of a sort of public office, and has public duties to perform, from which he should not be permitted to exonerate himself without the assent of the parties concerned. And this is not to be implied or inferred from a general notice to the public, limiting his obligation, which may or may not be assented to. He is bound to receive and carry all the goods offered for transportation, subject to all the responsibilities incident to his employment, and is liable to an action in case of refusal. And we agree with the court in the case of Hollister v. Nowlen, that if any implication is to be indulged from the delivery of the goods under the general notice, it is as strong that the owner intended to insist upon his rights, and the duties of the carrier, as it is that he assented to their qualification.

The burden of proof lies on the carrier, and nothing short of an express stipulation by parol, or in writing, should be permitted to discharge him from duties which the law has annexed to his employment. The exemption from these

[1] 19 Wend. R., 247. [2] 5 Barn. and Cres., 322, 327; 5 Bing. R., 217.

duties should not depend upon implication or inference, founded on doubtful and conflicting evidence; but should be specific and certain, leaving no room for controversy between the parties."[1]

The distinction taken in these cases is founded on a sound reason, and to a great degree annuls the force of public notices; leaving them to have their legitimate effect in limiting the carrier's liability, where there has been an unfair or fraudulent concealment of the nature or value of the goods delivered; and thus, too, compelling the carrier to make an express contract wherever he intends to limit his liability. In the English cases, the presumption has been that the employer assented to the carrier's notice, if brought home to his knowledge. But that presumption is clearly illogical, since it assumes the carrier's right to impose his own terms and so indirectly to evade his legal duty to accept the goods tendered to him for transportation. If he can fix absolutely his own terms, it would be very difficult to compel him to accept and carry.[2]

The carrier cannot, as we have seen, protect himself from responsibility for losses caused by the gross negligence of himself or his servants; for it is not consistent with common honesty for a bailee, charged with the safe custody and carriage of goods, to fail in observing even slight diligence.[3] And it seems that he cannot save himself from liability for losses occasioned by his neglect or default of duty.[4] In the case of Gould v. Hill, since overruled, the defendants on receiving the goods for transportation, gave to the plaintiffs a memorandum by which they promised to forward the goods to their place of destination, excepting, among other things, the dangers of fire; and the goods being burned on their passage, it was held that the defendants were liable

[1] The New Jersey Steam Navigation Company, respondents and appellants, v. The Merchants' Bank of Boston, libellants, 6 Howard's Rep., 344, per Mr. Justice Nelson.

[2] Cole v. Goodwin, 19 Wend. R., 251.

[3] 6 Howard's Rep., 344.

[4] 4 Sand. R., 136; 2 Adolph. and Ellis R., 646, Story on Bailm., § 570; 8 Mees. and Welsb., 461.

for the loss, though not resulting from negligence.[1] Taking such a receipt is evidence of assent to its terms.[2]

By the recent decision of the court of appeals in Dorr v. The New Jersey Steam Navigation Company, it is now settled in this state that common carriers may, by express contract, restrict their common law liability. In delivering the opinion of the court, Parker, J., observes: "Upon principle, it seems to me no good reason can be assigned why the parties may not make such a contract as they please. It is not a matter affecting the public interests. No one but the parties can be the losers, and it is only deciding by agreement which shall take the risk of the loss. The law, where there is no special acceptance, imposes the risk upon the carrier. If the owner chooses to relieve him and assume the risk himself, who else has a right to complain? It is supposed that the extent of the risk will be measured by the amount of compensation, and the latter, it will not be denied, may be regulated by agreement. The right to agree upon the compensation cannot, without great inconsistency, be separated from the right to define and limit the risk. Parties to such contracts are abundantly competent to contract for themselves. They are among the most shrewd and intelligent business men in the community, and have no need of a special guardianship for their protection. It is enough that the law declares the liability where the parties have said nothing on the subject. But if the parties will be better satisfied to deal on different terms, they ought not to be prevented from doing so."[3]

The opinion assumes it as settled that the carrier cannot screen himself from liability by notice, whether brought home to his employer or not; that the carrier cannot, by any mere act of his own, limit his responsibility at common law; and that at most the notice is to be regarded as only a proposal of terms, that must be accepted in order to constitute a contract between the parties. Silence, it seems, is not an acceptance of the terms of such a notice, as it would

[1] 2 Hill R., 623.
[2] 8 Mees. and Welsb., 443.
[3] 1 Kernan R., 485.

be if the carrier was at liberty to reject or receive the goods for carriage.[1]

Bill of Lading.

A bill of lading partakes of a two fold character; it is both a receipt and a contract. It is a receipt as to the articles constituting the cargo put on board of the vessel; and it is a contract to deliver the same at a certain place and to a certain party. So far as it is a receipt, it is open to explanation; but as a contract, it cannot be varied by parol testimony.[2] The old form of the bill, as given by Abbott on Shipping, was in these terms, which show clearly the nature of the contract:[3]

J. W. } Shipped, by the grace of God, in good order,
No. 1 @ 20. } by A. B., merchant, in and upon the good ship called the John and Jane, whereof C. D. is master, now riding at anchor in the river Thames, and bound for Barcelona in Spain, twenty bails, containing one hundred pieces of broadcloth, marked and numbered as per margin; and are to be delivered in the like good order and condition at Barcelona, aforesaid (the dangers of the seas excepted), unto E. F., merchant there, or to his assigns, he or they paying for the said goods per piece freight with primage and average accustomed. In witness whereof, the master or purser of the said ship hath affirmed to three bills of lading of this tenor and date, one of which bills being accomplished, the other two to stand void. And so God send the good ship to her destined port in safety.

Dated at London, the day of

The exception is an essential part of the agreement, and necessary to be stated in a complaint on the contract; since its omission, in setting forth the contract, is held a variance.[4] The substance of the bill of lading is an acknowledgment of the receipt of goods, and an engagement to deliver them to

[1] 19 Wend. R., 234, 251; 21 id., 153, 354; 26 id., 594; 3 Hill R., 9; 7 id., 533
[2] Wolfe v. Myers, 3 Sand. R., 7.
[3] Abbott on Shipp., part 4, ch. 4, 7th ed., p. 324.
[4] Cope and al. v. Cordova, 1 Rawle R., 203.

the consignee or his assigns; and hence any terms that limit or qualify the agreement must be set forth as forming part of it.

The decision of the case of Smith v. Shepherd,[1] already mentioned, where the loss happened at the entrance of the harbor of Hull, in consequence of the vessel striking against the mast of a ship previously sunk in the channel, and being thereby forced upon the bank recently rendered precipitous by a flood, created considerable apprehension among ship-owners and induced a change in bill of lading. The exception in the newly adopted form was expressed in these words: "The act of God, the king's enemies, fire and all and every other dangers and accidents of the seas, rivers and navigation of whatever nature and kind soever, save risk of boats, so far as ships are liable thereto, excepted." It is said that the old form is generally used in this country, confining the exception to the dangers of the seas, rivers or lakes.[2] But it is certain that other exceptions are very frequently, if not generally, inserted.[3]

It has been sometimes asserted that the usual exception "of the dangers of the seas" does not vary or qualify the liability of ship-owners as common carriers; in other words, that whatever is a peril of the sea will excuse the carrier acting under his general liability.[4] The assertion, however, is controverted as not supported by the cases.[5] There must have been, it should seem, a good reason for the introduction of such an exception, since it is not found in the form of the bill of lading used in the reign of Queen Elizabeth.[6] And there are instances where a loss has been adjudged to have been caused by a peril of the sea, which could not with any propriety be deemed an act of God, such as a destruction of goods by rats,[7] and losses sustained from pirates.[8] So, in an

[1] 21 Wend. R., 196. The case was tried in 1795.
[2] Story on Bailm., § 550; 1 Rawle R., 203; 3 Comst. R., 322; 1 Kernan R., 9.
[3] 2 Hill R., 623.
[4] Crosby v. Fitch, 12 Conn. R., 410; Williams v. Grant, 1 Conn. R., 487.
[5] 21 Wend. R., 198, 199.
[6] 10 John. R., 8.
[7] Carrigues v. Coxe, 1 Binn. R., 592; but see 6 Cowen R., 267; 1 Wils. 281.
[8] Pickering v. Barkley, Str., 132; 2 Roll. Abr., 248.

action on a policy of insurance against the perils of the sea; where in moving the ship from one part of a harbor to another it became necessary to send two of the crew on shore to make fast a new line and cast off the rope by which the ship was made fast, and the two men being immediately impressed and carried away without being allowed by the press-gang to cast off the rope in question, in consequence of which the ship went ashore and was lost; it was held a loss by perils of the sea within the policy.[1]

Exceptions inserted in the bill of lading are generally construed strictly against the carrier. Several cases of the kind have been decided in Tennessee, where it is held that the words, "dangers of the river only excepted," used in a bill of lading embrace only such dangers as could not be guarded against by human skill or foresight. The danger in that case was an invisible snag, in the Hatchie river.[2] In another case it is adjudged that the exception of the "dangers of the river which are unavoidable," narrows the liability of the boat owner, and releases him from all liability for accidents and loss occasioned by hidden obstructions newly placed in the river, of such a character as human skill and foresight could not discover and avoid.[3] In still another case, the court say:[4] "Sustaining the character of a common carrier, the boatman is liable to the owner of the goods for all losses not occasioned by the act of God, or the enemies of the country, and the burthen of proof is thrown upon him to show that the loss was occasioned in a manner that will exempt him from liability." The jury had been instructed that the "dangers of the river, as defined by the law, means all hidden obstructions in the river, as rocks, logs, sawyers, and the like, which could not be foreseen nor avoided by human prudence; and that before the carrier can be excused in a case of loss, he must show that the loss happened from some cause which human foresight or prudence could not avert." A verdict being found for the plaintiff, the charge was sustained.

[1] Hodgson v. Malcolm, 5 Bos. and Pul. R., 336.
[2] Johnson v. Friar, 4 Yerg. R., 48.
[3] Gordon v. Buchanan, 5 Yerg. R., 71.
[4] Turney v. Wilson, 7 Yerg. R., 340.

In Indiana, it has been held, that an exception contained in a bill of lading of a common carrier by land "of unavoidable dangers and accidents of the road," is not a restriction of his general liability.[1]

The decisions have the same tendency in Pennsylvania, to narrow and restrict the exception. Where a steamboat on the Ohio river ran upon a stone and stove a hole in her bottom, it was adjudged that the carrier was not discharged from liability by virtue of the clause in his bill of lading, "the dangers of the river only excepted;" but that in order to relieve himself from responsibility, it was incumbent on him to prove that due diligence and proper skill were used to avoid the accident, and that it was unavoidable.[2] So, the excepted "dangers of the navigation" of a public canal are such only as are incident to it when the trip is made in conformity to the public regulations, of which the carrier is bound to take notice; and consequently damage from the bilging of a boat in a lock which was entered in contravention of the rules, must be compensated by him.[3] So, in Georgia, an exception of "unavoidable accidents" is no limitation of the liability imposed by law.[4] But it has been held that an exception of the "dangers of the river" in a contract with a common carrier covers a loss occasioned by a collision with another boat, unless the loss occured by his negligence or that of the hands employed on the boat, or might have been prevented by reasonable skill and diligence.[5] In case of such a collision at sea, without any fault imputable to either vessel, there being no exception of the perils of the sea, the carrier is liable for the loss occasioned.[6]

Where goods are delivered to a carrier on a contract, "excepting the dangers of the navigation," to be carried by

[1] Walpole v. Bridges, 5 Blackf. R., 222.

[2] Whitesides v. Russell, 8 Watts and Serg. R., 44.

[3] Atwood v. The Reliance Transportation Co., 9 Watts. R., 87.

[4] Fish v. Chapman, 2 Kelly R., 349.

[5] Whitesides v. Thurlkill, 12 Smedes and Marshall R., 599.

[6] Plaisted v. Boston and Kennebec Steam Nav. Co., 27 Maine R., 132; 1 Kernan R., 9.

a particular route, the exception will not avail him if he deviate therefrom.[1] Nor does the privilege of reshipment or transhipping, reserved to the carrier, discharge or affect his liability for the safe delivery of the goods at their place of destination.[2] If a clean bill of lading is given, which imports that the goods are stowed under deck and cannot be contradicted by parol evidence of a different agreement, the carrier is answerable for any loss in consequence of the goods being improperly stowed on deck.[3]

Notwithstanding an exception in the bill of lading, the burden of proof still rests upon the carrier to exonerate himself from liability; in other words, he is still answerable as at common law, unless he shows a loss of the goods from a cause within the exception.[4] Where a box of sovereigns was shipped, to be carried for hire from New-York to Mobile, and the bill of lading only contained the usual exception, "against perils of the seas," and the vessel being wrecked on the Honda Reefs, the captain then removed the box from the state-room, where it could be locked up, and placed it in the run, where the crew had free access, and allowed it to remain there without personally superintending it, while the wreckers were on board, and the box was lost; it was adjudged that the burden of proof was on the carriers to show that the loss occurred by a "peril of the sea," and that failing in this, they were responsible for the loss, however it occurred; that embezzlement was not a peril of the sea, and that theft and robbery were perils of the seas only where they constituted the crime of piracy on the high seas; that the fact of the wreck did not vary the liability of the carriers, unless the property perished with the wreck, and in consequence of it, and that the carriers were bound to exert all possible diligence, care and skill.[5]

[1] Hand v. Baynes, 4 Whart. R., 204.

[2] 8 Watts and Serg. R., 44; Little v. Semple, 8 Mis. R., 99; Dansett v. Wade, 2 Scam. R., 285; St. John v. Van Santvoord, 25 Wend. R., 660.

[3] Cheery v. Halley, 14 Wend. R., 26; Waring v. Morse, 7 Ala. R., 343.

[4] King v. Shepherd, 3 Story, 349.

[5] 3 Story, 349.

In South Carolina, it seems that a well known, recognized and established usage, to exempt carriers of cotton from losses by fire, or a general and well understood notice to that effect by a particular carrier, may be shown so as to raise an implied contract limiting his liability in that particular, but that the carrier is still held to strict proof of diligence and care.[1] Indeed, he cannot, in this manner, limit his liability for the loss of goods intrusted to him resulting from his negligence.[2]

Substantially, the same doctrine is held in this state. Where goods and merchandise were delivered to an association of carriers to be transported from the city of New-York to Ogdensburgh on the river St. Lawrence, on a contract containing an exception of the "dangers of Lake Ontario," and the goods having been lost in a sudden squall on the lake, it was decided that the association were answerable, notwithstanding the exception, for negligence in either lading or navigating the vessel, not merely gross negligence, but for the want of that ordinary care which a prudent man would exercise in conducting his own affairs.[3] In the appellate court, Senator Hopkins, who delivered the prevailing opinion, was inclined to hold the rule of liability still more strictly against the carriers.[4]

In an English case a ship-owner, in a bill of lading, undertook that the goods should be delivered safe, "the act of God, the king's enemies, fire and all and every other dangers and accidents of the seas, rivers and navagation of whatever nature and kind soever, save risk of boats so far as ships are liable thereto, excepted;" and the goods having been dispatched from the ship in her boat, according to the usual course of trade in the West Indies, her place of destination, were, together with the boat, lost in a hurricane, and it was held that the ship-owner was not liable under the terms of

[1] Singleton v. Hilliard, 1 Strobhart, 203.

[2] Laing v. Colden, 8 Barr. R., 479.

[3] Fairchild v. Slocum, 19 Wend. R., 329.

[4] 7 Hill R., 292, 296. In setting forth the contract, the exception should be specified; but the declaration may be amended so as to avoid the variance.

the bill of lading to make good the loss.[1] Doubtless, such a loss would have been covered by the ordinary exception of the perils of the sea. The case of a collision at night, in a dense fog, or even in daylight on the open sea, is included among the excepted perils.

The case of Buller v. Fisher is an illustration in point. The action was against the owners of the ship Atlas for the loss of goods shiped in her, and the bill of lading contained an exception of the perils of the sea.[2] The circumstances presented were these: two ships called the Patriot and the Matthew, were sailing in one direction, and the Atlas in another; the Matthew was to leeward when they saw the Atlas coming; the Matthew steered to keep closer to the wind in order to give the Atlas an opportunity to pass; the Atlas mistook the object; and unable to weather both ships she and the Patriot ran foul of each other, and the Atlas went down. Lord Kenyon: "If the defendants have been guilty of any degree of negligence, and it could have been proved that the accident might have been prevented, they would have certainly been liable; but they are exempt by the condition of the charter-party from misfortunes happening during the voyage which human prudence could not guard against,—against accidents happening without fault in either party. I am of opinion that neither ship could be deemed to be in fault; and that the misfortune must be taken to be within the exception of the perils of the sea."

In Maine, whose coast is the scene of occasional accidents of this kind, it is held that the carrier who has made no exception in his bill of lading, must answer for the damages resulting from such a collision.[3] The collision occurred in the night, but as it is distinctly asserted that no fault was imputable to either vessel, the principle is the same.

If a ship be driven by stress of weather on, that is, near an enemy's coast, and there captured, it is considered a loss

[1] Johnston v. Benson, 1 Brod. and Bing. R., 454. The saving or exception within this exception is obscure and very awkward.

[2] 3 Esp., 67.

[3] 27 Maine R., 132.

by capture and not by the perils of the sea. On the other hand, if the vessel is not driven on the coast, but lost and destroyed by the waves some miles from the shore, and then plundered by the enemy, it is a loss by the perils of the sea. It is not material how near the shore or how far from it, the loss occurs; if the vessel be wrecked, stranded or lost, and afterwards visited by the enemy who captures the cargo, it is adjudged a loss by the perils of the sea, these being the immediate cause of the loss.[1] The law in these cases attributes the loss to the proximate and not to the remote cause. If the vessel be actually wrecked, and a part of the cargo dragged and thrown upon the shore where it is plundered by the people, it is of course deemed a loss by the perils of the sea.[2]

In actions on policies of insurance against the perils of the sea, the rule of construction is somewhat more liberal towards the assured than it is towards the carrier, who has made an exception of these perils in his charter-party or bill of lading.[3] Thus, it is established as a principle that the underwriters are liable for a loss, the proximate cause of which is one of the enumerated risks, though the remote cause may be traced to the negligence of the master and mariners.[4] As an example: A ship having goods on board which were insured, but warranted free from average, unless general, or the ship should be stranded, was compelled in the course of her voyage to put into a tide-harbor, and was there moored along side of a quay, in the usual place for ships of her burden. It became necessary, in addition to the usual moorings, to fasten her by tackle to a post on the shore, to prevent her falling over on the tide leaving her. The rope with which she was so fastened, not being of sufficient strength, broke when the tide left the vessel and she fell over upon her side, and was thereby stove in and greatly

[1] Hahn v. Corbett, 2 Bing. R., 205; Green v. Elmslie, Peake N. P. C., 278; Bondret v. Hentigs, Holt N. P. C., 149.

[2] Holt N. P. C., 149.

[3] 10 Peter's R., 507; 11 id., 213.

[4] Walker v. Maitland, 5 Barn. and Ald. R., 171.

injured; and it was held that this was a stranding within the meaning of that word in the policy; that the underwriters were liable for a partial loss, notwithstanding the stranding might have been occasioned remotely by the negligence of the crew in not using a stronger rope.[1]

Where a vessel founders, the carrier must ordinarily, in order to excuse himself, show that she was seaworthy for the particular trade; but in the case of an insurance on a vessel and her cargo, the implied warranty of her seaworthiness relates to the commencement of the risk.[2] So, a loss by fire, insured against, occasioned by the mere fault and negligence of the assured or his servants or agents, and without fraud or design, is a loss within the policy, upon the general ground that the fire is the proximate cause of the loss.[3] But if the master and crew barratrously bore holes in the bottom of the insured vessel, and she thereby fills and sinks, this is not a peril of the seas and rivers.[4]

The carrier, as we have seen, is answerable, though himself guilty of no negligence for a loss caused by the negligence or wrongful act of a third person; but where he has excepted the perils of the sea, and his vessel is driven against by the careless management of another vessel, he is not answerable for the loss occasioned.[5] But he is answerable, notwithstanding the exception, if the loss can be attributed to his want of care.[6] Where the carrier's vessel is disabled by the perils of the sea from proceeding on her voyage, it is the master's duty to employ another vessel in which to forward the cargo, provided that can be done. Though the vessel be lost, if the cargo remains safe, no recovery can be had on the policy of insurance against the perils of the sea

[1] Bishop v. Pentland, 7 Barn. and Cres. R., 219.

[2] Hollingworth v. Broderick, 7 Adolph. and Ellis R., 40; Bell v. Reed, 4 Binn. R., 127.

[3] 10 Peters' R., 507.

[4] 11 Peters' R., 213.

[5] Smith et al. v. Scott, 4 Taunt. R., 126.

[6] Williams v. Bronson, 1 Murph. (N. C.) R., 417; Marsh v. Blythe, 1 N. and McCord R., 170; Dale v. Hall, 1 Wils. R., 281; Jones on Bailm., 105; 6 Cowen R., 266.

covering the cargo, unless *it* is also lost in consequence of the disaster.[1] For the preservation of the venture, the master in a case of necessity, has a right to sell the cargo, or so much of it as may be necessary for repairs, in order to enable the vessel to proceed on her voyage.[2] But if he sells without any such necessity, his owners and employers as well as himself, will be answerable to the shippers for the goods; a sale being the last resort in the event of an overruling necessity.[3]

The signing of a bill of lading is the execution of a contract for the due performance of all the stipulations and conditions expressed in it, together with the common law obligations incident to such a bailment.[4] As it is the title under which the master receives the goods, he is strictly bound by the terms thereof; and on the other hand, is entitled to recover against the consignee or his assigns, the freight, demurrage, primage or other claim which he may have, according to the terms of the bill of lading.[5] If the consignee, for a valuable consideration expressed, transfers his interest in the bill of lading by indorsement, his assignee acquires exactly his interest and title in the bill, and assumes his duties and liabilities under it.[6] But the consignee has no title to assign until the bill of lading has been sent or delivered to him; for the consignor, being the general owner, may at any time after the consignment and before the property has reached the consignee, transfer the title to the goods to a third person, by an assignment of the bill of lading, or even by a delivery thereof with intent to pass the title.[7]

As between the owner and shipper of the goods and the captain, the bill of lading fixes and determines the duty of

[1] 9 John. R., 21; 2 Campb., 623.

[2] 2 Sumn. R., 206.

[3] 5 Barn. and Ald., 617.

[4] Dobbin v. Thornton, 6 Esp. R., 16.

[5] Seggart v. Scott, 6 Esp. R., 22; Moller v. Living, 4 Taunt. R., 102.

[6] Waring v. Cox, 1 Campb. R, 369; Cuming v. Brown, 1 Campb., 104; Cock v. Taylor, 2 Campb. R., 587; 13 East R., 399.

[7] Bank of Rochester v. Jones, 4 Comst. R., 497.

the latter as to the person, to whom it is (at the time) the pleasure of the former, that the goods should be delivered. But there is nothing final or irrevocable in its nature. The owner of the goods may change his purpose, at any rate, before the delivery of the goods themselves, or of the bill of lading to the party named in it, and may order the delivery to be to some other person, to B instead of to A.[1]

Where there is an agreement between the consignor and consignee, that the latter shall make advances on the credit of goods sent to him by the former, and hold and dispose of them upon commission for his reimbursement, the consignee acquires a vested interest in the goods, although they fail to come into his actual possession; and his interest attaches the moment the goods are put in charge of the carrier for transportation, and is accompanied by the remedies given to an absolute vendee.[2] The agreement to this effect may be either inferred from circumstances or shown by a direct and express contract.[3] It may be inferred by a jury where a party consigns goods to another and sends him a letter of advice, and immediately after draws upon him for funds, and he accepts the drafts, and the goods are set apart or put en route for the consignee. As between the original parties, it is said there is no magic in a bill of lading; it may be indorsed for various purposes, not only as evidence of an absolute sale, but of a trust, a pledge, or a mere agency, either of which is always provable by parol.[4]

Where the bill of lading, as of goods shipped from New-York to Liverpool, contains the usual clause, naming the consignee to whom delivery is to be made, and adding "he paying freight for the same with primage and average accustomed;" though the carrier has a right to insist upon payment of freight as a condition precedent to the delivery, yet if he deliver the goods and the consignee afterwards refuse

[1] Mitchell v. Ede, 11 Adolph. and Ellis R., 888.

[2] Patten v. Thompson, 5 Maule and Selw. R., 350; Vertue v. Jewell, 4 Campb., 31; Cuming v. Brown, 9 East R., 506; Grosvenor v. Phillips, 2 Hill R., 147.

[3] Holbrook v. Wright, 24 Wend. R., 169; Haillee v. Smith, 1 Bos. and Pul., 563.

[4] 2 Hill R., 151, 152; Bryans v. Nix, 4 Mees. and Welsb., 791; 4 Comst. R., 497.

to pay the freight, the carrier may recover the same of the consignor; the cargo being shipped on his account.[1] But where the goods are not owned by the consignor and not shipped on his account and for his benefit, the carrier is not entitled to call on the consignor for freight; and it seems it is his duty, in all cases, to endeavor to get the freight of the consignee, as directed in the bill of lading, and that he, on receiving the goods, becomes bound to pay the same.[2]

Freight is earned on the delivery of the cargo at the place of destination; but no freight is due for goods which perish by the perils of the sea, during the course of the voyage.[3] But where the vessel is driven by the perils of the sea into an intermediate port, and is unable to proceed to her port of destination, and the goods are received at the intermediate port by the owner, freight *pro rata itineris* is due for the goods so received.[4] If the carrier offer to hire another vessel on which to forward the cargo, or is able, within a reasonable time, to repair his own vessel so as to proceed on the voyage, he is entitled to demand his full freight.[5] But if the master, without sufficient cause, refuses to repair his ship or to send on the goods by another vessel, the owner may demand the cargo and shall be discharged from freight, both full and *pro rata*. To entitle the carrier to *pro rata* freight, there must be a voluntary acceptance of the goods by the owner; for if he be forced or constrained to receive them at the intermediate port, this is not such an acceptance of them as will raise an implied promise to pay the freight to that place.[6]

It seems where freight is paid in advance, on a contract for the carriage and delivery of goods, and the vessel is shipwrecked, and the voyage broken up, the shipper is entitled to a return of the freight, there being no agreement to the

[1] Barker v. Havens, 17 John. R., 234; Shephard v. De Bernacles, 13 East R., 508.
[2] Shield v. Davis, 6 Taunt. R., 65.
[3] Frith v. Barker, 2 John R., 327.
[4] Robinson v. Marine Ins. Co., 2 John. R., 324; Smith v. Wright. 15 Barb. R., 51.
[5] Luke v. Lynde, 2 Burr., 882; Mulloy v. Backer, 5 East R., 316.
[6] Welch v. Hicks, 6 Cowen R., 504; 7 id., 564; 9 John. R., 19.

contrary.[1] But where a passenger took ship and paid his passage in advance from Amsterdam to Batavia, and on the voyage the vessel put into New-York in distress, and the owner there offered him a passage in another ship, larger and more commodious, to Batavia, which he declined, he was not permitted to recover back any part of the passage money, since it was his own fault that he did not proceed on his voyage.[2] The contract is entire, so that no return can be demanded, unless a failure to fulfill the terms of it is shown.

The law superadds to the stipulations expressed in the contract of charter-party, certain duties and obligations incident to the carrier's employment, but it enforces the contract of the parties so as to give it effect according to its terms. Where the whole of a vessel is chartered to take a cargo at certain specified rates per ton, if the shipper does not furnish a full cargo, the owner of the vessel is entitled to freight not only for the cargo actually put on board, but also for what the vessel might have carried.[3] So, where a vessel is chartered for a voyage, out and home, for an entire sum of money, to be paid on her return home, her return is a condition precedent, to entitle the owner to freight; and if she is lost before commencing the homeward voyage, the owner can neither recover on the charter-party, nor on an implied assumpsit, for the freight of the outward voyage.[4] The contract is to pay for the vessel for the voyage, out and home, a specific sum on her return; and hence nothing becomes due until she returns.[5] Having made a special contract, by which freight is payable in one event only, the parties must abide by the terms of their own agreement.[6]

[1] Watson v. Duykinck, 3 John R., 335.
[2] Detouches v. Peck, 9 John. R., 210.
[3] Duffie v. Hayes, 15 John. R., 327.
[4] Tennoyer v. Hallett, 15 John. R., 332.
[5] Barker v. Cheriot, 2 John. R., 352.
[6] Liddard v. Lopes, 10 East R., 529.

Carriage of Goods.

The essence of the common carrier's contract is to carry and deliver safely the goods intrusted to him. The manner in which he performs the undertaking, becomes a matter of importance and inquiry only after a loss or injury has been sustained, in consequence of his deviating from the instructions received, or from the terms of his contract. Thus, the master of a vessel is responsible for the safe stowage of goods under deck; for if he carries them on deck without the owner's consent, and they are lost by the dangers of the sea, or thrown overboard for the safety of the vessel, the owners of the goods under deck are not bound to contribute to the loss.[1] So, the carrier must carry goods in the manner directed, or show that the loss did not happen in consequence of his neglecting to observe the instructions accompanying them; a box, containing a glass bottle filled with the oil of cloves, delivered to a common carrier and marked "glass, with care, this side up," is a sufficient notice of the value and nature of the contents, to charge him for the loss of the oil, occasioned by his disregarding the direction.[2] He cannot relieve himself from the duty of carefully stowing the goods delivered to him.[3] No matter what exception he makes, or what notice he gives, he is answerable for accidents arising from the breach of his implied agreement in all cases, that the vessel, or coach, or vehicle he uses, whatever it be, is sufficient for the business in which it is employed.[4] If in unloading his boat at the termination of the voyage, he uses the tackle or machinery of a third person in hoisting the goods from his boat, and it breaks and the goods are injured or destroyed, he is responsible for the loss; the machinery is *pro hac vice* his, and he is answerable for its sufficiency.[5]

Where a carrier on the lakes agrees to forward by steam, goods so marked, and instead of doing so sends them by a

[1] The Paragon, Elwell, master, Ware, 322; Dodge v. Bartol, 5 Greenl. R., 286.
[2] Hastings v. Pepper, 11 Pick. R., 41.
[3] 19 Wend. R., 329.
[4] Camden, &c. Company v. Burke, 13 Wend. R., 611; 5 East R., 428.
[5] De Mott v. Laraway, 14 Wend. R., 225.

sailing vessel, and they are lost in a gale, he is liable for their value.[1] He must also perform his undertaking on the particular route, as well as in the mode or conveyance for which he stipulates.[2] If, indeed, he can show that the injury or loss of the goods delivered to him has resulted from the owner's carelessness or neglect of duty, either in packing and securing the goods properly or in failing to do some act which it is incumbent upon him to perform, the carrier is not responsible for the consequences.[3] Neither is he answerable for a loss by fire after his duty as a carrier has ended; as where he has conveyed the goods to the place where another carrier was to take them up, and deposited them in his own warehouse for the convenience of the owner of the goods, the latter carrier not having arrived.[4]

Without any special agreement, the carrier on the Hudson river receiving goods at New-York addressed to persons at places on the canals north and west of Albany, without any directions other than those painted upon the boxes in which the goods are packed, is bound only to transport and deliver them according to the established usage of the business in which he is engaged. His duty as a common carrier ceases at the end of his route, where he becomes a mere forwarder.[5] The consignor is presumed to know, and at all events bound by the uniform usage of business.

But if he cantract to carry them to their place of destination beyond the termination of his route, receiving a compensation for the entire service, he is answerable as a carrier for the whole distance. Thus, a contract to forward goods from the city of New-York to Fairport in Ohio, subjects the party to liability as a common carrier for the whole route, although his own transportation line extends only part of the way, and the loss occurs on a portion of the

[1] Wilcox v. Parmelee, 3 Sand. R., 610.

[2] 4 Whart. R., 204; 7 Blackf. R., 497.

[3] Whalley v. Wray, 3 Esp. R., 74; but see 23 Wend. R., 306; Stuart v. Crawley, 2 Stark. R., 323.

[4] 4 Term R., 581; 5 Term R., 398.

[5] St. John v. Van Santvoord, 25 Wend. R., 660; 6 Hill R., 157.

route in which he is not interested.[1] His receiving the goods on an undertaking to deliver them at their place of destination, renders it of no moment whether the carrier conveys the goods in his own vessel or in a vessel belonging to another company.[2] He is liable in respect of his express contract, and he is not permitted to deny his character as a carrier, in derogation from his agreement.[3] Like every other person entering into a contract, he is bound to perform his engagements in the mode and to the extent for which he contracts; and hence he cannot transfer the liability he has voluntarily assumed to another.[4]

As the carrier, where he has made no special agreement, becomes a forwarder of the goods at the end of his route, he is bound at that point to observe carefully the instructions which he has received in regard to the mode and line by which they are to be sent forward.[5] In the absence of any positive directions on the subject, it is his duty to forward the goods by a responsible line, on the usual route.

There is a class of cases in which the carrier, being authorized to sell the goods at their place of destination, it does not seem to be agreed when his duty as a carrier ceases.[6]

In Kemp v. Coughtry, where the master of a vessel, employed in the transportation of goods between the cities of Albany and New-York, received on board a quantity of flour to be carried to New-York, and there sold, in the usual course of business, for the ordinary freight, and the flour was sold by the master at New-York for cash, and while the vessel was lying at the dock, the cabin was broken open and the money stolen out of the master's trunk, while he and the crew were absent, it was adjudged that the owners of the vessel were answerable for the money to the shippers

[1] 3 Sand. R., 610; 19 Wend. R., 329.
[2] Muschamp v. Lancaster Railway Co., 8 Mees. and Welsb., 421.
[3] Weed v. S. & S. Railroad, 19 Wend. R., 534; 8 Wend. R., 483.
[4] Garnett v. Willan, 5 Barn. and Ald., 53, 342.
[5] Ackley v. Kellogg, 8 Cowen R., 223.
[6] Kemp. v. Coughtry, 11 John. R., 107; Story on Bailm., § 547, 548.

of the flour, though no commissions nor any distinct compensation beyond the freight was allowed for the sale of the goods and bringing back the money, such being the duty of the master in the usual course of the employment, where no special instructions were given. The opinion of the court proceeds upon the assumption that the owners of the vessel become carriers of the money on the return voyage; in other words, that the contract is entire, for the transportation, sale and return of the moneys received for the cargo.[1]

The question to determine is whether his duty as a common carrier ended prior to the loss; if so, he holds subsequently in another character, namely, that of a bailee responsible for ordinary care and diligence.[2] The same point often arises at the other end of the route; as where a warehouse-man or forwarding merchant, who is also a carrier, receives goods into his storehouse for a time, to be afterwards carried to their place of destination. He is responsible for the safe keeping as an ordinary bailee for hire, and as a carrier from the time his duty as such commences.[3] If delivered to be stored and afterwards forwarded, the duty of the bailee for safe keeping is that of a warehouse-man, bound to guard against all probable danger.[4]

The liability of intermediate carriers, who are sometimes necessarily employed to connect different lines of conveyance, to answer to the owner for any injury to goods sustained by negligence or accident whilst under their charge, depends on the fact of their being independent carriers, or only subsidiary to the undertaking of the carrier originally contracting for the safe conveyance of the goods. There being no privity of contract between the owner and such third person to whom the carrier originally employed, for the sake of convenience, or necessity, transfers them; unless the liability of the carrier first employed continues, the owner would be without any sure remedy.[5] Hence the only

[1] 11 John. R., 107.
[2] 1 Term. R., 27; 10 Metcalf R., 472.
[3] Platt v Hibbard, 7 Cowen R., 497.
[4] Roberts v. Turner, 12 John. R., 232; 7 Cowen R., 500.
[5] Wardell v. Mowrillyan, 2 Esp. R., 693.

case in which an implied contract between the owner and such third person employed, can be raised, is, where by the particular terms of the first contract the duty, and consequently the responsibility, of the carrier, terminates at a particular point; for then the delivery and receipt of the goods from the carrier to such third person is sufficient to raise an implied contract on his part to take care of, or deliver safely such goods according to the direction; and for the breach of this implied contract an action will lie against him.[1] But the action does not lie where the transfer is only accessory to the fulfillment of the carrier's contract.[2] As where goods are carried in small boats up the rapids of a river, or from the quay to a railroad depot, on a change from water to land carriage. In such cases, and wherever a transhipment becomes necessary, the laborers and carmen employed in the work are only the agents and servants of the carrier;[3] that is to say, the act of making the transhipment or transfer from one conveyance to another is that of the carrier, who is bound to make a safe delivery to the company or line by which the goods are to be carried forward.[4]

The true question to settle in all such cases is, how far the undertaking of the carrier extends; as a rule, it extends to the termination of his route, where the goods are marked for a more distant destination, and continues until he has delivered them safely to another responsible carrier. The act of delivery being his own, every person employed by him to do the work which he has undertaken to perform, is a servant for whom he is answerable.[5] This is upon the familiar principle, that the master is liable for the tortious acts of his servant, when done in the course of his employment, although they may be done in disobedience of his express orders.[6]

[1] Garside v. Trent. and Mersey. Nav. Co., 4 Term. R., 581.

[2] Hyde v. Trent. and Mersey. Nav. Co., 5 Term. R., 389.

[3] Jeremy on Car., 68, 69.

[4] Van Santvoord v. St. John, 6 Hill R., 157.

[5] Machu v. The London and Southwestern Railway Co., 12 Jur., 501.

[6] The Philadelphia and Reading Railroad Co. v. Derby, 14 Howard U. S. R., 468.

The policy of the law does not permit the carrier to relieve himself from responsibility by handing the goods over to irresponsible third persons, or intermediate carriers, whom the owner has no opportunity of choosing or guarding against.[1] There is, it seems, a distinction in this respect between ship carriers and such as are inland. With regard to the former, when goods are imported from foreign countries, they are brought under a bill of lading, which is merely an undertaking to carry from port to port. A ship trading from one port to another has not the means of forwarding the goods on land, and, therefore, by the established course of trade, a delivery on the usual wharf will discharge the ship carrier, and be considered a performance of his undertaking.[2] But if there is a particular usage at the port of delivery, the contract is supposed to be made with reference to it; there being no local usage, the mode of delivery is regulated by the general custom.[3]

In a case where the precise place of delivery is material, it is proper to allow evidence of the local usage. For instance, the usage at the Havana is often proved to show that some species of cargoes, such as slaves, are to be delivered at the Moro Castle, and that other articles are deliverable only on the wharfs in the inner harbor. But though the wharf is the proper place of delivery, the mere landing of the goods on the wharf is no delivery, unless made at the proper time and accompanied by a distinct notice to the consignee.[4] It is said, however, that the hoyman who brings goods from an outport into the port of London is not discharged by landing them at the usual wharf, but is bound to take care and send them out by land to the place of consignment; his duty being fixed by the custom.[5]

A common carrier remains liable until the actual delivery of the goods to the consignee; or if the course of the busi-

[1] Jeremy on Car., 68.

[2] Hyde v. The Trent and Mersey Nav. Co., 5 Term R., 389; Cope v. Cordova, 1 Rawle (Penn.) R., 203.

[3] 1 Rawle R., 203; Ostrander v. Brown, 15 John. R., 39; 5 Term R., 389.

[4] 15 John. R., 39; Packard v. Getman, 6 Cowen R., 757.

[5] Wardell v. Mourillyan, 2 Esp. N. P. R., 693; 4 Term R., 260.

ness be such that delivery is not to be made to the consignee, his liability continues until notice of the arrival of the goods be given. But it is adjudged that the carrier may show that the uniform usage and course of the business in which he is engaged, is to leave goods at his usual stopping places in the towns to which they are directed, without notice to the consignees; and if such usage be shown of so long continuance, uniformity and notoriety, as to justify a jury to find that it was known to the plaintiff, the carrier will be discharged.[1]

In cases of jettison, where in a tempest it becomes necessary for the preservation of the vessel and cargo, as well as the lives of the crew, to lighten her by throwing overboard a part of her lading, the carrier is not liable.[2] That is to say, he is not responsible for the loss as a carrier; but he is bound, in common with the others whose property has been thereby saved from destruction, to contribute to the loss. The mode of ascertaining the amount of each person's contribution varies in different countries; it is usually done upon the ship's arrival at the port of discharge, by ascertaining the net value of the ship, freight and cargo, as if nothing had been lost; these are to be valued at the price they would fetch at the port of discharge, and the net amount, after deducting all charges, is the sum which is subject to the contribution. If a part of the apparel or tackle of the ship is sacrificed for the common benefit and safety, it is to be included in the loss for which compensation is to be made. As to the goods and property lost, the practice is to estimate them, as well as those saved, at the price they would have fetched at the port of discharge on the ship's arrival there, freight being deducted. Upon this footing a general average is made, so as to restore to the owners of the property sacrificed for the general safety, an amount *pro rata* equal to that realized by the owners of the residue saved.[3]

[1] Gibson v. Culver, 17 Wend. R., 305; Barnes v. Foley, 5 Burr., 2711; Rushforth v. Hadfield, 7 East R., 224.

[2] 2 Kent's Comm., 604; Smith v. Wright, 1 Caine's R., 43.

[3] Strong v. The New-York Firemen Ins. Co., 11 John. R., 123.

When a general average is fairly settled in a foreign port, and the insured is obliged to pay his proportion of it, he may recover the amount from the insurer, though the average may have been settled differently abroad from what it would have been at the home port.[1] After a loss, it is the duty of the master to cause an adjustment to be made upon his arrival at the port of destination, and upon its being completed he has a lien upon the cargo to enforce the payment of the contribution.[2]

The ship, cargo and freight on the goods carried to the port of discharge, contribute to the loss in proportion to their value;[3] but no freight is allowed on the goods sacrificed, since none becomes due thereon.[4]

We have already observed that, ordinarily, the owners of goods under deck, are not bound to contribute to the loss of goods stowed on deck, which are thrown overboard in a gale for the safety of the vessel.[5] This is upon the principle that goods so carried embarrass the navigation of the ship, and are usually received upon a special contract under which the carrier is not answerable for losses arising from their exposed situation. According to the mercantile usage, a clean bill of lading imports that the goods have been stowed under deck; in other words, if nothing is said in the bill as to the manner of stowing the goods, the presumption is that they are to be stowed away in the usual manner under deck.[6] This is the general usage, and hence goods received for carriage on deck, under a special undertaking, are not to be deemed a part of the cargo.

The general custom or usage of business, it seems, may be shown by way of fixing the import of the terms used in a written contract, but proof of a parol agreement between the parties cannot be received to vary the effect of a bill of

[1] Depau v. The Ocean Ins. Co., 5 Cowen R., 63; Story on Bailm., § 583, 584.
[2] Walpole v. Ewer, Park on Ins., 565, 566; 11 John R., 336.
[3] Story on Bailm., § 583; United States v. Wilder, 1 Law Reporter, 189.
[4] Frith v. Barker, 2 John. R., 328; 11 John. R., 323.
[5] Lenor v. The United States Ins. Co., 3 John. Cases, 178; 1 Caines' R., 43.
[6] Creery v. Holley, 14 Wend. R., 26; Dodge v. Bartol, 5 Greenl. R., 286.

lading;[1] as to show that, notwithstanding the bill, the goods were received to be carried on deck.

"The true and appropriate office of a usage or custom is to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising not from express stipulations, but from mere implications and presumptions, and acts of a doubtful or equivocal character. It may also be admitted to ascertain the true meaning of a particular word or of particular words in a given instrument, when the word or words have various senses, some common, some qualified, and some technical, according to the subject matter to which they are applied. But I apprehend, that it can never be proper to resort to any usage or custom to control or vary the positive stipulations in a written contract, and, *a fortiori*, not in order to contradict them. An express contract of the parties is always admissible to supersede, or vary, or control a usage or custom; for the latter may always be waived at the will of the parties. But a written and express contract cannot be controlled or varied, or contradicted by a usage or custom; for that would be not only to admit parol evidence to control, vary or contradict written contracts, but it would be to allow mere presumptions and implications, properly arising in the absence of any positive expressions of intention, to control, vary or contradict the most formal and deliberate written declarations of the parties. Now, what is the object of the present asserted usage or custom? It is to show that, notwithstanding, there is a written contract (the bill of lading), by which the owners have agreed to deliver the goods, shipped in good order and condition at Boston, the dangers of the seas only excepted; yet the owners are not to be held bound to deliver them in good order and condition, although the danger of the seas has not caused or occasioned their being in bad condition, but causes wholly foreign to such a peril. In short, the object is, to substitute for the express terms of the bill of lading an

[1] 14 Wend. R., 26.

implied agreement on the part of the owners, that they shall not be bound to deliver the goods in good order and condition; but that they shall be liable only for damage done to the goods occasioned by their own neglect. It appears to me that this is to supersede the positive agreement of the parties, and not to construe it."[1] The custom in respect to the navigation of a particular lake may be shown with a view to carry into effect the written agreement of the parties as understood by them;[2] but not to vary its terms.

Barcroft's case, as cited by Chief Justice Rolle, seems to hold the carrier liable in cases of jettison:[3] "A box of jewels had been delivered to a ferryman, who knew not what it contained, and a sudden storm arising in the passage, he threw the box into the sea; yet it was resolved that he should answer for it." "Now," says Sir William Jones, "I cannot help suspecting that there was proof in this case of culpable negligence, and probably the casket was both small and light enough to have been kept longer on board than other goods; for in the case of the Gravesend barge, cited on the bench by Lord Coke, it appears that the pack which was thrown overboard in a tempest, and for which the bargeman was holden not answerable, was of great value and great weight; although this last circumstance be omitted by Rolle, who says only, that the master of the vessel had no information of its contents."[4] If goods be unnecessarily thrown overboard, or if a small, light and very valuable package be first thrown into the sea, it is but reasonable that the carrier should answer for his stupidity; for the jettison must be justified by necessity.[5]

[1] The Schooner Reeside, 2 Sumn. R., 567, per Mr. Justice Story. The offer was to show that by *custom* the owners of packet vessels between New-York and Boston, were to be considered liable only for damage occasioned by their own neglect.

[2] May v. Babcock, 4 Ohio R., 334.

[3] Cited in Kensig v. Eggleston, Aleyne R., 93.

[4] Jones on Bailm., 108; Bulstr., 280; 2 Ro. Abr., 567; Story on Bailm., § 531.

[5] 5 Greenl. Me. R., 286.

When the loading on the deck has taken place with the consent of the merchant, it is obvious that no remedy against the ship-owner or master, for a wrongful loading of the goods on deck, can exist. The foreign authorities are indeed express on that point, and the general rule of the English law, that no one can maintain an action for a wrong, where he has consented or contributed to the act which occasioned his loss, leads to the same conclusion.[1] An agreement for the carriage of goods upon deck takes from the owner of them all right to a contribution for them if thrown into the sea for the safety of the vessel and cargo; and it absolves the carrier in a case of strict necessity.[2] This is not to be so understood as to absolve the carrier from his duty to provide a vessel sufficient in all respects for the voyage, well manned, and furnished for the voyage; if a loss happens through defects in any of these respects, he must make it good.[3]

Though the master of a vessel improperly stow a part of the goods received by him for transportation, on the deck, it seems he is not liable for a loss occurring from some other cause; as if the vessel so laden is set on fire by the lightning, and thereby destroyed. In other words, the carrier is not answerable for a loss attributable solely to an act of God, or to a cause for which he is not responsible under the terms of his bill of lading.[4] But if he has done any act, such as deviating from his direct route, which can be affirmed to have brought his vessel into the danger, he must respond in damages.[5]

Delivery by the Carrier.

The contract of the carrier, being to transport and deliver safely the goods received by him on hire for carriage,[6] he is

[1] Per C. J. Tindal, in Gould v. Oliver, 4 Bing. (N. C.) R., 142.

[2] Barber v. Brace, 3 Conn. R., 9.

[3] Bell v. Reed, 4 Binn. R., 127; 3 Wheaton R., 168.

[4] Hastings v. Pepper, 11 Pick. R., 41; The Paragon, Ware R., 322; Hollingsworth v. Broderick, 7 Adolph. and Ellis R., 40.

[5] Davis v. Garrett, 6 Bing. R., 716; Parker v. Flagg, 2 Maine R., 181.

[6] Jeremy on the Law of Car., 63.

not at liberty to place the goods in his warehouse at the place of destination, and commit the duty of making an actual delivery to a third person so as to discharge himself from personal responsibility; neither can he modify his undertaking so as to let down his responsibility to that of a warehouse-man.[1] Even a custom to make a delivery of goods on the wharf without further troubling himself about them, will not discharge him from the implied undertaking to deliver the goods according to the direction.[2]

In Hyde v. The Trent and Mersey Navigation Company, Mr. Justice Buller, the other justices concurring, observes:[3] "According to the argument, from the inconvenience that carriers are not bound to deliver goods, I think the same argument tends to establish a much greater inconvenience, the necessity of three contracts, in all cases where goods are sent by a coach or wagon; one with the carrier, another with the innkeeper, and a third with the porter. But, in fact, there is but one contract; there is nothing like any contract, or even communication, between any other person than the owner of the goods and the carrier; the carrier is bound to deliver the goods, and the person who actually delivers them acts as the servant of the carrier. If the innkeeper has some interest in the concern, then he is liable as a carrier. It has been said, too, that the place of a porter is valuable, and the subject of a purchase; but who sells it? Not the person to whom the goods are sent, but the carrier or the innkeeper, whom I consider the same person. If the innkeeper has no share in the profits, then he is the servant of the carrier, as well as the porter. Therefore, whether there be the innkeeper and the porter, or the porter only, the carrier is liable in all cases where the goods are lost, after they get into the hands of the innkeeper or porter, because they are delivered to these persons with the consent and as the servants of the carrier. The different proprietors may divide the profits among themselves, in any way they

[1] 5 Term R., 389.
[2] Wardell v. Mourillyan, 2 Esp. R., 693.
[3] 5 Term R., 389.

choose, but they cannot, by their own agreement with each other, exonerate themselves from their liability to the owners of the goods. They may fill the two different characters of warehouse-men and carriers, at different times, but I deny that they can be both warehouse-men and carriers at the same instant. If the undertaking was to carry and deliver, then the goods remain in their custody, as carriers, the whole time."

Circumstances sometimes qualify the duty of the carrier in relation to the delivery, so as to reduce his liability to that of a warehouse-man; as where he is prevented from delivering them at the end of his route to the succeeding carrier by his non-arrival, and in the meantime places them in his storehouse.[1] The manner of delivering the goods, and consequently the period at which the responsibility of the carrier will cease, depend upon the custom of particular places, and the usage of particular trades. But he is bound to make a delivery such as the law demands, though the mode of making it is by no means uniform.[2]

Prima facie the carrier is under an obligation to deliver the goods to the consignee personally; but the limits and mode of delivery are to be determined by the usage of the place.[3] In some cases the delivery is accomplished by landing the goods on the usual wharf and giving notice to the consignee.[4] Since ships and vessels must stop at the wharf, and railroad cars at the depot, notice given to the consignee of the arrival of the goods and of their place of deposit, is taken by custom in lieu of personal delivery.[5] Indeed, it is adjudged that the carrier, by a line of stages, may prove that the uniform usage and course of the business in which he is engaged is to leave goods at his usual stopping places in the towns to which they are directed, without notice to the

[1] Garside v. The Trent and Mersey Nav. Co., 4 Term R., 581.

[2] Ostrander v. Brown, 15 John. R., 39.

[3] 2 Kent's Comm., 604, 605; Golden v. Manning, 3 Wils., 425; Rushforth v. Hadfield and others, 7 East, 224; 4 Term R., 581.

[4] Ostrander v. Brown, 15 John. R., 39; Chickering v. Fowler, 4 Pick. R., 371.

[5] 17 Wend. R., 311.

consignees; and if such usage be shown of so long continuance, uniformity and notoriety, as to justify a jury to find that it was known to the plaintiff, the carrier will be discharged.[1] The presumption is, that the parties contract with reference to the well known custom, and so make it a part of the agreement between them.

The business of carrying goods by railway, which has recently grown so extensive, has given rise to a discussion of the duty of the railroad company in making delivery at the place of destination. In Massachusetts the company is regarded as a common carrier until the goods arrive at their place of destination, and are separated from others and securely stored; after that, the carriage being ended, they are considered depositaries of the goods, bound to reasonable care and diligence in the custody of them.[2] The law of the transaction is thus laid down by the supreme court of that state: "The transportation of goods and the storage of goods are contracts of a different character; and though one person or company may render both services, yet the two contracts are not to be confounded or blended; because the legal liabilities attending the two are different. The proprietors of a railroad transport merchandise over their road, receiving it at one depot or place of deposit, and delivering it at another, agreeably to the direction of the owner or consignor. But from the very nature and peculiar construction of the road, the proprietors cannot deliver merchandise at the warehouse of the owner, when situated off the line of the road, as a common wagoner can do. To make such a delivery, a distinct species of transportation would be required, and would be the subject of a distinct contract. They can deliver it only at the terminus of the road, or at the given depot where goods can be safely unladed and put into a place of safety. After such delivery at a depot, the carriage is completed. But, owing to the great amount of goods transported and belonging to so many different persons, and in consequence of the different hours

[1] Gibson v. Culver, 17 Wend. R., 305.

[2] Thomas v. Boston and Providence Railroad Co., 10 Metc. R., 472.

of arrival, by night as well as by day, it becomes equally convenient and necessary, both for the proprietors of the road and the owners of the goods, that they should be unladed and deposited in a safe place, protected from the weather and from exposure to thieves and pilferers. And where such suitable warehouses are provided, and the goods, which are not called for on their arrival at the places of destination, are unladed and separated from the goods of other persons, and stored safely in such warehouses or depots, the duty of the proprietors as common carriers, is, in our judgment, terminated. They have done all they agreed to do; they have received the goods, have transported them safely to the place of delivery, and the consignee not being present to receive them, have unladed them, and have put them in a safe and proper place for the consignee to take them away; and he can take them at any reasonable time. The liability of common carriers being ended, the proprietors are, by force of law, depositaries of the goods, and are bound to reasonable diligence in the custody of them, and consequently are only liable to the owners in case of a want of ordinary care. In the case at bar, the goods were transported over defendants' road (from Providence to Boston), and were safely deposited in their merchandise depot, ready for delivery to the plaintiff, of which he had notice, and were, in fact, in part taken away by him; the residue, a portion of which was afterwards lost, being left there for his convenience. No agreement was made for the storage of the goods, and no further compensation paid therefor; the sum paid being the freight for carriage, which was payable if the goods had been delivered to the plaintiff immediately on the arrival of the cars, without any storage. Upon these facts, we are of opinion, for the reasons before stated, that the duty of the defendants, as common carriers, had ceased on their safe deposit of the plaintiff's goods in the merchandise depot; and that they were then responsible only as depositaries without further charge, and consequently, unless guilty of negligence in the want of ordinary care in the custody of

the goods, they are not liable to the plaintiff for the alleged loss of a part of the goods."[1]

It is assumed in this case that it is no part of the duty of the railroad company to move the goods from the depot; there must, however, occasionally arise cases, where on a long line of transportation, as from Boston to the Mississippi, it will become the duty of one railroad company to deliver the goods to another; and this must evidently sometimes be accomplished by the employment of cartmen and other intermediate carriers and agents.

Where the delivery is made at the place of destination to the owner or consignee, not in the usual manner, but under his direction and by the use of machinery suggested or employed by him, the railroad company is not answerable for injury resulting from the mode adopted in unloading the goods.[2] Louis v. The Western Railroad Corporation was an action to recover damages alleged to have been caused by the defendants' negligence in the delivery of a block of marble. The block, weighing about four tons, was brought from Pittsfield to Worcester in one of the defendants' cars, and the plaintiff paid the freight; the truckman usually employed by the plaintiff to do his trucking, and by him particularly requested to obtain and bring the block to him, applied to the defendants' superintendent to permit the car on which the marble was brought, to be hauled to the depot of the Boston and Worcester Railroad Corporation, in order to use the derrick and machinery of that corporation in unloading the block from the car and placing it upon the truck; there being no such machinery at defendants' depot, and plaintiff's agent having made the arrangement in question, the truckman and the defendants' agent to deliver and receive freight, drew the car to the neighboring depot, and proceeded with the use of the machinery mentioned to remove the block from the car to the truck; and in the attempt the machinery gave way, and the block of marble fell and was broken; and it was adjudged that the defen-

[1] 10 Metcalf R., 472.

[2] Lewis v. The Western Railroad Corporation, 11 Metcalf R., 509.

dants were not answerable for the want of care and skill in the persons so employed in removing the goods from the car, nor for the insufficiency of the machinery used in the removal.[1]

This decision does not trench upon the general proposition, that when the responsibility of a common carrier has once begun, it continues until there has been a due delivery by him.[2] It proceeds rather upon the assumption that where the owner takes the actual charge of the goods, making his own arrangement for their removal from the carriage in which they are brought, they are to be regarded as already constructively delivered.[3] Such acts by himself or by his authorized agent amount to an acceptance of the property; in other words, the place and manner of the delivery is varied with the assent of the owner of the property; and where he interferes to control or direct in the matter, he assumes the responsibility.

Properly speaking, such interference and control, by the owner with the assent of the carrier, is evidence of the delivery of the property.[4] For the owner may accept the goods at any time or place, either before or after they have arrived at their place of destination, and thus discharge the carrier of his duty in this particular.[5] In respect to the time of making the delivery, he is responsible only for the exercise of due diligence, and may excuse delay by showing an accident or misfortune, although not inevitable; it is enough if he exerts reasonable diligence to guard against delay.[6]

Under a statute of this state regulating the business of railroad corporations, it is enacted that "every such corporation shall start and run their cars for the transportation

[1] De Mott v. Laraway, 14 Wend. R., 225, shows that where the carrier on his own motion uses the tackle or machinery of a third person, in the act of making a delivery, he is answerable for its strength and sufficiency.

[2] 4 Term R., 581; 5 Term R., 389.

[3] 11 Metcalf R., 509; American Railway Cases, 610.

[4] Bowman v. Teall, 23 Wend. R., 306.

[5] Parsons v. Hardy, 14 Wend. R., 215.

[6] 14 Wend. R., 218.

of passengers and property, at regular times to be fixed by public notice; and shall furnish sufficient accommodation for the transportation of all such passengers and property as shall, within a reasonable time previous thereto, be offered for transportation at the place of starting and the junctions of other railroads, and at usual stopping places established for receiving and discharging way passengers and freight; and shall both transport and discharge such passengers and property at, from and to such places on the due payment of the freight or fare legally authorized therefor; and shall be liable to the party aggrieved, in an action for damages, for any neglect or refusal in the premises."[1]

This act makes railroad corporations common carriers of all kinds of property, with such variations as the nature of the business requires; and it makes it their duty to furnish sufficient accommodation for the transportation of all such property as shall be offered for transportation, and to carry and deliver the same, rendering them liable to the party aggrieved, in an action for damages, for any neglect or refusal in the premises. But under this statute in an action for damages occasioned by delay, it was adjudged that the defendant was not liable where it was shown that the defendant's road was in good order and well provided with cars and engines, and that as many freight trains were run thereon as could be run with safety; that the quantity of merchandise received for transportation by the defendant exceeded the capacity of its road to transport the same immediately, and accumulated in the depots along the road; and that this caused the delay complained of in the conveyance and delivery of the plaintiff's produce, which was forwarded and delivered as soon as other property received at the same time; that such delay was not the fault of the corporation.[2]

It is to be observed that the burden of proving a delivery rests upon the carrier; having received money or goods for

[1] Laws of 1850, p. 231.

[2] Wibert v. The New-York and Erie Railroad Co., 2 Kernan R., 245.

transportation, the law compels him either to deliver, or excuse a non-delivery of them.[1] Without question he may make such a contract for the carriage of property as to render the time of performance essential; so, if he especially undertake to deliver safely, any article carried, he will be bound by his undertaking to answer for the loss, although it may happen from an unavoidable accident.[2]

The carrier is bound to transport and deliver the goods within a reasonable time, and the delivery or tender of them to the consignee must also be reasonable in respect to time, place, and manner; and this is a question for the jury. If the goods be tendered after the hours of business, or when the consignee is unable to receive them, such tender will not discharge the carrier.[3] Though the custom be to deliver, by landing the goods on the wharf and giving notice to the consignee of their arrival, it is adjudged in Pennsylvania that the responsibility of the carrier upon the Ohio river goes farther, and requires him to see that they are actually received.[4] The rule seems to be held strictly in that state, with a view to the protection of those whose property has to be frequently transhipped on the route to its western destination; and it is thought no worse of on account of being held so stringently as in some cases to give to the owner an election either to sue the consignee or the carrier.

Substantially the same rule is held in South Carolina and in this state—it is the duty of the carrier to find the consignee and make the delivery to him in such a reasonable time and manner as to enable him to receive the goods.[5] The rule is general, that the carrier is bound to deliver the goods intrusted to him, personally, to the consignee at the place of delivery;[6] but in certain cases where the transportation is by vessels or boats, notice of the arrival and place

[1] Sheldon v. Robinson, 7 N. Hamp. R., 157.
[2] Gaither v. Barnet, 2 Brevard (S. C.) R., 488.
[3] Hill v. Humphreys, 5 Watts and Serg. R., 123.
[4] Hemphill v. Chenie, 6 Watts and Serg. R., 62.
[5] Galloway v. Hughes, 1 Bail. (S. C.) R., 553; 15 John. R., 39.
[6] Fish v. Newton, 1 Denio R., 45.

of deposit, is sufficient, and comes in place of a personal delivery; and where goods are safely conveyed to the place of destination, and the consignee is dead, absent or refuses to receive, or is not known and cannot after reasonable efforts be found, the carrier may discharge himself from further responsibility, by placing the goods in store with some responsible third person in that business, at that place, for and on account of the owner. When so delivered, the storehouse-keeper becomes the bailee and agent of the owner in respect to such goods.[1] So, where no consignee has been named, it is the duty of the common carrier to store the goods at the place of delivery with a responsible person to the order of the owner.[2] But the carrier is not bound to guarantee that the person so becoming the depositary of the goods, shall continue solvent and responsible.

In those cases where notice given to the consignee of the arrival and place of deposit comes in lieu of personal delivery, the landing of the goods on the usual wharf with notice does not constitute a delivery, until a reasonable time has elapsed after such notice for the consignee to come and receive the goods.[3] In assumpsit on a special contract to carry from wharf to wharf, the unlading of the goods on the wharf would, it seems, be such a performance as to protect the carrier from loss by fire occurring after that.

A promise by the master of a vessel to deliver goods to a consignee, does not require that he should deliver them to the consignee personally or at any particular wharf. It is sufficient if he leaves them at some usual place of unlading, giving notice to the consignee that they are so left.[4] If after such notice, the consignee refuses to receive the goods, it is the duty of the master to take care of them for the owner, unless the consignee is under an obligation to receive them, in which case they will be at his risk.[5] The carrier must

[1] 1 Denio R., 45.
[2] 1 Bail. (S. C.) R., 553.
[3] Bourne v. Gatliff, 8 Scott's New R., 604.
[4] Chichering v. Fowler, 4 Pick. R., 371.
[5] 4 Pick. (Mass.) R., 371.

take care that he does not, by abandoning the goods, render himself liable for their value.

D undertook to remove certain boxes of lumber down a river and deposit them safely in a certain cove; but being prevented by the owner of the cove from depositing them there, he left them in an eddy immediately below the cove, in a safe place as could be found, fastened by a rope, and paid no further attention to them; the water in the river afterwards rose, in consequence of which the lumber was carried away and lost; and it was held, in an action brought by the owner against D to recover for the lumber so lost, that it was not only the duty of the defendant, under the circumstances of the case, to place the lumber in a safe place as there was near to the cove, but also to continue a prudent care over the same, until he had given notice to the owner, and until the owner, after such notice, could resume the care and control thereof.[1]

We have said the carrier is bound to transport and deliver the goods received by him for carriage, within a reasonable time. It is manifest that what shall be deemed reasonable time, must depend very much upon the circumstances of the case and the causes interrupting the voyage, or delaying the arrival of the carrier. The freezing of the river, or of the canals, may delay him until the opening of the navigation in the spring.[2] Stress of weather may compel him to stop by the way for repairs.[3] An embargo may suspend his duty until it is taken off by an order in council, or some legal act of government.[4] In these and similar cases the carrier is excused for the reasonable and necessary delay to which he is subjected; he is not discharged from his duty as a carrier.

Being arrested by the ice without any fault on his part, he is bound on the opening of the navigation to proceed with diligence to complete the transportation, and deliver the

[1] Pickett v. Downer, 4 Verm. R., 21.
[2] 23 Wend. R., 306; 14 Wend. R., 215.
[3] Herbert v. Hallett, 3 John. Cases, 93, 538.
[4] Hadley v. Clarke, 8 Term R., 259.

goods.[1] If his vessel be injured by the perils of the sea, and remain capable of being made seaworthy within a reasonable time, he is bound to repair and proceed on his voyage without any unnecessary delay. Where he is arrested by an embargo, his duty revives the moment it is removed.[2] In Hadley v. Clarke, the defendants contracted to carry plaintiff's goods from Liverpool to Leghorn; on the vessel's arriving at Falmouth, in the course of her voyage, an embargo was laid on her "until the further order of council;" and it was adjudged that the same only suspended, but did not dissolve the contract between the parties; and that even after two years, when the embargo was taken off, the defendants were answerable to the plaintiff in damages for the non-performance of their contract. So, an interruption of a voyage, preventing a delivery, by the officers of government stationed at Canton, acting with legal authority, forms an excuse, so long as it continues, for a non-delivery.[3]

However, if goods put on board a ship to be carried from one place to another, are wrongfully seized by the officers of government, so that they cannot be delivered to the consignee, the owner of the goods has an action for the non-delivery against the owner of the ship, who must seek his remedy over against the officers of government.[4] The distinction seems to be this: the carrier is answerable where he is prevented from discharging his duty by any unlawful act, but is not answerable where he is stayed in the execution of his contract by a legitimate act of government. The parties are supposed to contract in subjection to the law of the land and the authority from which it emanates, each holding the same relation and being affected alike by the exercise of the sovereign power.

Under ordinary circumstances the carrier is bound to proceed without any needless delay. A declaration in case,

[1] Bowman v. Teal, 23 Wend. R., 306; Parsons v. Hardy, 14 Wend. R., 215; 4 Blackf. R., 260.

[2] 8 Term R., 259.

[3] Evans v. Hutton, 5 Scott's New R., 670.

[4] Gosling v. Higgins, 4 Cambp. R,, 451.

alleged that the defendants were common carriers, and that plaintiff delivered to them and they received certain goods of the plaintiff to be carried for him from London to Birmingham, and there to be delivered to the plaintiff for a reasonable hire and reward; and then averred that it was the duty of the defendants safely and securely to carry and deliver the goods, but that, although a reasonable time for carrying and delivering the goods, as aforesaid, had long since elapsed, yet the defendants neglecting their duty in that behalf, did not deliver the goods to the plaintiff, but that they were, by the neglect of the defendants, wholly lost to the plaintiff. The defendants pleaded, first, not guilty; secondly, that the goods had not been delivered to them. At the trial, it appeared that a parcel had been delivered to defendants, as alleged, in London on the eighth of August addressed to the plaintiff at Birmingham, where it ought to have arrived on the tenth, but did not till the third or fourth of September, which was before the commencement of the action; and upon this evidence it was held that the plaintiff was entitled to recover, the duty to deliver within a reasonable time being a term engrafted by legal implication upon a promise or duty to deliver generally; and the breach stated (in the absence of a special demurrer) being to be read as in effect stating that the defendants did not deliver within a reasonable time.[1]

Stated in affirmative terms, the carrier is bound by implication of law and without any special agreement on the subject, to transport and deliver within a reasonable time, or with due diligence and dispatch. But from the nature of things the cases involving his duty in this respect, are of a negative character, deciding rather what is not, than what amounts to due diligence; or what is the same thing, the principle is illustrated by the exceptions and variations from it. All unusual delay in either transporting or delivering goods, is evidence of want of due diligence; and unless it is excused, it will render the carrier answerable for the damages resulting therefrom.[2]

[1] Raphael v. Pickford, 6 Scott's New R., 478.

[2] Black v. Baxendale, 1 Exch. R., 410; 5 N. Hamp. R., 357.

In an action against a common carrier for goods received by him at Cincinnati for Tiptonsport on the Wabash river, it appeared that for four months after the delivery to the carrier the navigation was obstructed by low water; and this was adjudged a good defence for the time it continued, but not after that, especially not a good defence where it appeared that the navigation had remained unobstructed a sufficient time for the complete execution of the contract before the commencement of the action.[1] Whether the excuse offered for the delay be valid or otherwise, must, in each case, depend upon the circumstances attending the transaction.[2] It is no excuse for a non-delivery, that the carrier of money went to the bank to which it was to be delivered, and found it closed; he should make known his business to its officers, or go to the bank in business hours.[3]

But the proper time for a steamboat or other vessel, to deliver specie to the consignee, is not limited to banking hours, unless such is the special contract or the established usage of the port (which usage must be proved); and an offer to deliver it at any time during the usual hours of business, reasonable regard being had to its safety and the convenience of the consignee, is as good as one made in banking hours.[4] The offer to deliver freight or passenger's baggage made at a proper time, though declined, discharges the master and owners from liability as common carriers; and if the freight still remain in their custody, they hold it as mere bailors, accountable according to the terms, express or implied, of the bailment. If the property remains on board without any stipulation for a reward for the continued care of it, they are, it seems, answerable for a loss only in a case of gross neglect.[5]

The mere arrival of the goods at their place of destination though known to the owner of them, whose duty it is to come

[1] Wallace v. Vigus, 4 Blachf. R., 260,

[2] 4 Wharton R., 204.

[3] Merwin v. Butler, 17 Conn. R., 138.

[4] Young v. Smith, 3 Dana. (Ken.) R., 91.

[5] 3 Dana. R., 91. The carrrer's duty in the custody of a consignment of specie, would in any case damand a diligent care.

and receive the goods from the carrier, does not discharge the carrier until after the lapse of a reasonable time. If not demanded within a reasonable time, his liability as a common carrier does not continue.[1] But neither he nor any other bailee can excuse himself by showing a delivery on a forged order.

Where the goods arrive in the evening, too late for delivery on the same day, the carrier's responsibility continues until the proper time arrives for making the delivery.[2] The defendants, who were common carriers, undertook to carry certain boxes of goods on the railroad from Philadelphia to Columbia. The cars arrived at the latter place about sundown on Saturday evening, and by direction of the plaintiffs were placed on a sideling. The plaintiffs declined receiving the goods that evening on the ground that it was too late; whereupon the agent of the defendants left the cars on the sideling, taking with him the keys of the padlocks with which the cars were fastened, and promised to return on Monday morning. The cars remained in this situation until Monday morning, when they were opened by the plaintiffs by means of a key which fitted the lock; and, on examination, it was discovered that one of the boxes had been opened and the contents carried away, and it was adjudged that the defendants were answerable for the goods lost.[3]

If the carrier's vessel be injured by an inevitable accident, he is still liable for damages arising from want of diligence and proper exertions towards saving and delivering the goods on board; and of this the jury are to judge, taking as a proper standard of such diligence, the conduct which a prudent man of intelligence would observe in taking care of his own property, similarly situated.[4] The carrier, being a railroad company, is also bound to the like care at the place of destination, even after the unloading.[5] Plaintiff booked a large

[1] Powell v. Myers, 26 Wend. R., 591.

[2] Eagle v. White, 6 Whart. R., 505.

[3] 6 Whart. R., 505. The same rule is held in Hill v. Humphreys, 5 Watts. and Serg. R., 123; it is a question for the jury whether the tender be reasonable as to time, manner and place.

[4] Faulkner et al. v. Wright et al., 1 Rice R., 107.

[5] McHenry v. Railroad Co., 4 Harrington R., 448.

quantity of rags for transportation by defendants' railroad from Philadelphia to Wilmington; they were carried safely, and left at Wilmington without storage, exposed to the weather, by which they were injured; and it was held that a common carrier is bound to deliver goods safely, and to store them when necessary, unless there be a different and well known usage.

Where goods addressed to a distant destination are delivered to one company of carriers, whose route extends but part of the way, and it becomes necessary to deliver them to a succeeding line to be forwarded, the delivery should be made without delay, according to the instructions received; or, if there be no instructions, then according to the usual course of business.[1] But if there be no carrier there to whom they can be immediately delivered, the goods may be stored for the convenience and safety of the owner; and in this case the carriers are not answerable as such for their custody.[2] The rule is otherwise where the carrier receives goods and stores them for his own convenience at the end of his route, before entering on the duty of transporting them.[3]

The defendants, being common carriers on the Erie canal, between Albany and Buffalo, and occupying a warehouse on

[1] 8 Cowen R., 223; 6 Hill R., 157.

[2] Garside v. The Proprietors of the Trent and Mersey Nav.: At the trial it appeared that the goods, directed to the plaintiff at Stockport, were delivered to the defendants to be carried by them from Stourport to Manchester; that they arrived safe at Manchester on the 30th of September, were that evening put into the defendants' warehouse there (where, together with other goods), they were consumed by an accidental fire that night, and before any carrier came from Stockport to whom they could be delivered. It also appeared that, according to the course of business, when goods are sent from Stourport to go beyond Manchester, if any carrier to the place of their destination be at Manchester ready to receive them, they are immediately delivered upon payment of the carriage from Stourport to Manchester, and if not, the defendants keep them in their warehouse till a carrier arrive to whom they may be delivered on making the above payment, the defendants charging nothing for storing the goods. An agent of defendants had previously told plaintiff that if he would send his goods by them they would not insist upon payment of the freight. Held that the keeping of the goods in the warehouse being for the convenience of the owner, and the defendants having performed their contract, they were not liable for them as carriers. (4 Term R., 581.)

[3] 1 Term R., 27; Parsons v. Monteath, 13 Barb. R., 353, 361.

the pier at Albany, their agent in New-York received goods there belonging to the plaintiff, and gave a receipt or shipping bill therefor, in the name of the defendants, by which they agreed to transport the goods to Brighton Locks, "the dangers of the lakes, of fire and acts of Providence excepted." The goods reached Albany on the morning of the 17th of August, A. D. 1848, and were taken from the towboats into the defendants' warehouse on the pier. On the same day a fire originated in the city of Albany, by some accident, a quarter of a mile from the defendants' warehouse. The wind increased and carried the flames to a great distance. The warehouse was consumed, and the plaintiff's goods being removed by the defendants' agent into a canal boat in the basin, were destroyed by the fire.[1] Upon this state of facts it was adjudged by the Monroe general term of the supreme court, first, that the loss was produced by natural causes, and not by inevitable accident or the act of God; second, that the defendants sustained the relation of common carriers of the goods, at the time the fire broke out, and when the goods were destroyed, and that the rules of law incident to that relation, applied to them; and, third, that the defendants had a right to circumscribe or limit their common law liability as common carriers by agreement; and that having expressly excepted the risk of loss by fire, they were not liable for the value of the goods. This decision is conformable to that of the supreme court of the United States, of the superior court of the city of New-York, to that of the court of appeals of this state, and to the general current of authorities, overruling the case of Gould v. Hill.[2]

A case decided at the same term of the court, in which the loss arose from the same fire mentioned above, holds that a carrier on the Hudson river, contracting to deliver goods to a line of canal carriers at Albany for a western destination, though he has commenced the act of delivery,

[1] 13 Barb. S. C. R., 353.

[2] 6 Howard's Rep., 344; 4 Sand. S. C. R., 136; 14 Barb. R., 524; 1 Kernan R., 485.

continues responsible as a carrier until it is completed.[1] The facts presented in the action were briefly these: The river carrier brought the goods in a barge from the city of New-York, arriving at Albany on the morning of the seventeenth, where they were destroyed by the great fire which occurred on that day. Before they were burned, a portion of them were unloaded from the barge and put into a float in the basin, belonging to the defendants, which was a stationary floating craft, kept for the purpose of receiving goods brought up the river, with different apartments for the different transportation lines west. It had been there for several years, and the custom was to discharge goods brought up the river into it, from which the goods were reshipped into canal boats, to be taken west, the canal boats coming along side of the float and receiving their cargoes immediately from the float. This state of facts, it was adjudged, did not discharge the river carrier of his responsibility, nor entitle him to be treated as a warehouse-man of the goods after the arrival of the barge at Albany. He has a right to warehouse the goods only in the absence of the canal line, or in case of its refusal or neglect to receive them, after notice; and the case is not one of such inevitable accident as excuses the carrier from his common law liability for the loss of the goods.[2]

In a similar case, the proprietors of a line of river boats received on board of their barges at New-York goods for Brockport, to be delivered at Albany to a canal line to carry forward. On the fourteenth of August the goods were put on the float belonging to the owners of the barge, kept in the Albany basin. On the fifteenth, notice was given to the canal line that the goods were on the float, with a request that they should come and receive them; the notice was repeated on the seventeenth, when the canal line

[1] Miller v. The Steam Navigation Company, 13 Barb. R., 361. It seems the float is not to be regarded as a warehouse; and even if it is, the unlading of goods into it is not a delivery until a reasonable time has elapsed after notice of such act of delivery.

[2] 13 Barb. R., 361.

promised to come and receive them as soon as they had finished taking on board the goods from another line. But on the same afternoon, the float, with the goods on board, was consumed; and it was adjudged that the float was not in any legal sense of the term a warehouse; that there had been in fact no delivery, but only a passing over of the goods from one vessel to another belonging to the river carriers; that by retaining the goods in their custody voluntarily they continued their common law responsibility; though it seems that if under the circumstances they had warehoused the goods, their liability would have been entirely discharged.[1]

Stoddard v. The Long Island Railroad Company presents the case of a double relation. Adams & Co. received a quantity of silks to be carried by them from New-York to Boston as express carriers; and there was a special agreement between them and the defendants limiting their common law liability; the goods having been injured in unloading them from the defendants' vessel, the agreement was held valid, and it was presented to the jury as a question of fact whether there was negligence in unloading them.[2] In such a case the owner of the goods is restricted in his right of recovery by the terms of the contract entered into by the express agent or carrier.[3]

We have seen that, though by the general rule the carrier is bound to make a delivery to the consignee personally, still the mode of making it is in a great measure regulated by the custom and usage of business.[4] In the case of goods brought by ships from foreign countries, the bill of lading usually signed is merely a special undertaking to carry from port to port; according, therefore, to the established course of trade, a delivery on the usual wharf is such a delivery as will discharge the owners.[5] There is, however, no inherent

[1] Goold v. Chapin, 10 Barb. R., 612.
[2] 5 Sand. R., 180.
[3] 6 Howard's Rep., 344.
[4] 17 Wend. R., 305; 6 Whart. R., 435, 505.
[5] Jeremy on Car., 66; 5 Term R., 389; 1 Rawle R., 203.

difference between the liabilities and duties of a carrier from foreign ports and a coasting or inland carrier. In each case it is his duty to deliver to the consignee or his assigns, and it is evident that he must see that he makes the delivery to the right person. In order to do this he must see or notify the consignee on his arrival.

In Cope v. Cordova, Rogers, J., in delivering the opinion of the court, comments thus upon the mode of unloading and delivering the contents of a vessel from a foreign port: "In unloading a vessel at the port of Philadelphia, it is usual, as soon as articles of bulk, such as crates, are brought upon deck, to pass them over the side of the ship, and land them on the wharf. The owners station a clerk on the wharf, who takes a memorandum of the goods, and the day they are taken away, and this for the information of his employers. A manifest or report of the cargo is made by the master, and deposited at the custom-house, and the collector, on the arrival of the vessel within his district, puts and keeps on board one or more inspectors, whose duty it is to examine the contents of the cargo and superintend its delivery. And no goods from a foreign port can be unladen or delivered from the ship in the United States, but in open day, between the rising and setting of the sun, except by special license; nor at any time without a permit from the collector, which is granted to the consignee upon payment of duties or securing them to be paid. The holders of a bill of lading are presumed to be well informed of the probable period of the vessel's arrival, and at any rate such arrival is a matter of notoriety in all maritime places. The consignee is previously informed of the shipment, as it is usual for one of the bills of lading to be kept by the merchant, a second is transmitted to the consignee by the post or packet, while the third is sent by the master of the ship, together with the goods. With the benefit of all these safeguards, if the consignee uses ordinary diligence, there is as little danger in this country as in England and France, of inconvenience or loss; whereas the risk would be greatly increased if it should be the duty of the ship-owner to see to the actual

receipt of the goods, and particularly in the case of a general ship with numerous consignments on board, manned altogether by foreigners unacquainted with the language at the port of delivery. I have taken some pains to ascertain the opinion and practice of merchants of the city on this question, which is one of general concern. My inquiries have resulted in this, that the goods, when landed, have heretofore been considered at the risk of the consignee, and that the general understanding has been, that the liability of the ship-owner ceases upon the landing of the goods at the usual wharf. I see no reason to depart from a rule which has received such repeated sanctions, from which no inconvenience has heretofore resulted, and which it is believed in practice has conduced to the general welfare. If the special verdict had found a uniform usage in the one way or the other, we should have held ourselves bound by the custom; for I fully accede to the principle, that the mode of delivery is regulated by the practice of the place. The contract is supposed to be made in reference to the usage at the port of delivery. But if no usage had been found, we hold it to be equally clear, that we should be governed by the general custom."[1]

The above opinion was given in a case where it appeared that the consignee had obtained a permit for the landing of the goods, and knew that the master of the vessel was discharging the cargo. It is true the learned judge takes a distinction between the custom in relation to carriers from foreign ports and coasting or inland carriers, seeming to hold the latter to the performance of a more strict duty. Doubtless there are circumstances of notoriety attending the arrival of a foreign vessel which do not wait upon the coasting or inland vessel coming into port; especially where the consignee is required to obtain a permit from the collector of customs for the landing of the goods, which may very well come in place of the formal notice of arrival required

[1] 1 Rawle (Penn.) R., 203.

of an inland vessel. But in each case there is an appeal made to the custom and usage of the port of delivery.[1]

Whenever there is a well established usage, in relation to business, such as the delivery or forwarding of goods, both parties are bound by it and presumed to contract with reference to it; and this presumption is so strong that positive ignorance on the one side will not avail to render it of non-effect.[2] But the usage must be well established, so as to warrant the fair inference that the parties contracted with reference to it.[3]

In the absence of any express agreement or special custom, a delivery at the wharf, which is the usual place of delivery, with notice to the consignee, is a delivery to the consignee.[4] There being no special or local usage, the delivery is to be governed by the general custom.[5]

Where the carrier has a warehouse at the place of destination, in which by a usage well known among his employers or by a special agreement he is accustomed to store the goods for the accommodation and benefit of the owner until it is convenient for the latter to come and take them away, the carrier is not answerable for them, as a carrier, after they are safely warehoused.[6] His duty having ended as a carrier, his responsibility is changed, as we have seen, into that of a warehouse-man. If no act remains to be done by him in his character of a carrier, his liability as such is at an end.[7] Where he unites the two characters of a warehouse-man and carrier, and receives goods for storage until an order of the owner is given to send them forward, or where he transports them to the end of the route and there, by agreement or a usage tantamount to a contract, places them in store to await the call of the owner, he is responsible

[1] Ostrander v. Brown, 15 John. R., 39; Quiggin v. Duff, 8 Mees. and Welsb. R., 574.

[2] 18 Verm. R., 52; 16 id., 52; 6 Hill R., 157.

[3] Albatross v. Wayne, 16 Ohio R., 513; 4 Harring R., 448; 17 Wend. R., 305.

[4] 4 Pick. R., 371; 6 Cowen R., 757; 2 Kent's Comm., 604, 605.

[5] 1 Rawle R., 203; 3 Dana R., 91.

[6] In the matter of Webb and others, 8 Taunt R., 443.

[7] Hyde v. The Trent and Mersey Nav. Co., 5 Term R., 389.

as a warehouse-man while in the discharge of the duties incident to that species of bailment, and as a carrier for the rest of the time.[1]

As the carrier cannot dispute the title of the party who delivers goods to him, it follows that he is answerable for a non-delivery unless he is prevented from making the delivery by a loss of the goods, caused by the act of God or of the public enemy, without any fault on his part.[2] If he has restricted his liability by the terms of his agreement, he may of course excuse a non-delivery at the place of destination by showing a loss from which he has expressly exempted himself; that the goods have been in fact accepted at another place; that they have been taken from him by the authority of law; or that the owner has assumed the custody and control of them.[3]

It is to be further observed that wherever the right of *stoppage in transitu* exists, and the vendor exercises it by countermanding the delivery, the carrier is excused for a non-delivery.[4] This right of stopping goods in their transit is in its nature a kind of equitable lien adopted by the law, for the purposes of substantial justice, and not proceeding on the ground of rescinding the contract.[5] At first it was considered only an equitable remedy in cases of fraud or insolvency; it has now become firmly established as a common law right, which continues until the goods have reached the actual or constructive possession of the consignee.[6] It is held to be a power tacitly reserved out of the former control which the consignor had over his property at the time of delivering it to the carrier, and therefore paramount to any agreement between the carrier and consignee, in respect of any duty, or right of lien, which may arise upon those or other goods; so that if the consignor would exert this

[1] Platt v. Hibbard, 7 Cowen R., 497; 11 Adolph. and Ellis R., 43.

[2] 6 Bing. R., 743; Rossiter v. Chester, 1 Dong. (Mich.) R., 154.

[3] 18 Verm. R., 186; 6 Whart. R., 418; 11 Metcalf R., 509; 4 H. and Johns. R., 291; 14 Wend. R., 215; 11 Shep. (Me.) R., 339.

[4] Little v. Cowley, 7 Taunt. R., 169.

[5] Hodgson v. Loy, 7 Term. R., 440.

[6] Ellis v. Hunt, 3 Term R., 464.

privilege, and reclaim the goods, he is only subject to such lien or duty, as may have arisen in consideration of that particular bailment, for the labor and diligence bestowed on the goods.[1]

According to Mr. Justice Story this right of stoppage *in transitu* exists only in cases where all the following circumstances concur: where the goods are sold on a credit; where the consignee is insolvent; where the goods are still in transit, and have not been delivered to the consignee; and where the buyer has not yet parted with his ownership to any bona fide purchaser, without notice, under him.[2] The right does not necessarily presuppose a fraud in the purchase, so as to require a rescinding of the contract; and yet it seems that it does not exist where the vendor knew at the time of the sale, the purchaser to be insolvent.[3]

The right is thus stated in a single sentence by Mr. Justice Bronson:[4] The vendor, in the case of a sale on credit, may resume the possession of the goods while they are in the hands of a carrier or middle-man, in their transit to the consignee or vendee, on his becoming bankrupt or insolvent. Neither an attachment, nor an execution issued against the consignee, will be permitted to supersede the right of stoppage *in transitu*, since this power in the vendor of intercepting the goods is adjudged to be the elder and preferable lien.[5] The right continues until the *transitus* has ended, or until the goods have reached the place of delivery; and this does not happen until they have reached the place named by the buyer to the seller, as the place of their destination.[6]

Where a sale of goods is procured by fraud, the vendor still retains his legal right in them, unless after discovering the fraud, he assents to the act of sale, either positively, or by such delay in reclaiming the goods as authorizes the

[1] Oppenheim v. Russell, 3 Bos. and Pul. R., 49; Jeremy on Car., 103.

[2] Story on Bailm., § 581.

[3] Buckley v. Furniss, 15 Wend. R., 137.

[4] 15 Wend. R., 141.

[5] Smith v. Goss, 1 Campb. N. P. R., 282; 15 Wend. R., 144, 145.

[6] Coates v. Railton, 6 Barn. and Cres., 422; 7 Term R., 436; Dixon v. Baldwin, 5 East R., 186; Rowe v. Pickford, 8 Taunt. R., 83.

inference of an assent.[1] The act of stoppage *in transitu*, is in its nature adverse to the vendee; and the doctrine on that subject does not apply, where the vendor and vendee are agreed that the property shall be reclaimed; for it is then a question of reconveyance or rescision.

The right of stoppage *in transitu* is exercised by giving to the carrier or middle-man notice not to deliver over the goods to the consignee, accompanied by a tender of the freight and legal charges. The notice protects the carrier from an action for non-delivery, and also renders him responsible for any disobedience of the notice.[2] The demand must be made of the carrier or middle-man, in whose custody the goods are at the time, so as to prevent a delivery of them to the vendee.[3] The right of stoppage in the vendor does not cease on the arrival of the goods at the port of delivery, until they have come to the vendee's actual possession or his constructive possession by a delivery to his agent.

Chancellor Walworth in Mottram v. Heyer, says: "The general principles in regard to the right of stoppage *in transitu*, are now very well settled, both here and in England; and the only difficulty is in applying those principles to the facts of particular cases, as they from time to time arise. One of those principles is that, though by the common law a sale of the goods may be complete without actual delivery, yet if the purchaser fails after such sale, and while the goods remain in the hands of the vendor, or while they are in the hands of a middle-man in the course of their transit to the possession of the vendee, the vendor may retain them in his own custody, or may stop them in the hands of such middle-man, and resume and retain the custody of them, until he is paid or secured for the price of the goods. And this right exists whether the time of credit which was given, has or has not expired, at the time the right to retain the goods, or to resume the possession of them by stopping them *in transitu* is exercised by the vendor, or by his authorized agent.

[1] Ash v. Putnam, 1 Hill R., 302.

[2] 7 Taunt. R, 169; 3 East R., 397; 4 Term R., 260; 15 Wend. R., 144.

[3] Mottram v. Heyer, 5 Denio R., 629.

(*Feise v. Wray*, 3 *East's R.*, 96; *Brow. Law of Sale*, 507.) Another principle is, that the right to stop *in transitu* continues not only during the time that the goods remain in the possession of the carrier, either by land or by water, but also while they are in the hands, or under the control of a middle-man, in a place of deposit connected with the transmission or delivery of them, until they come to the actual or constructive possession of the vendee himself. (*Buckley v. Furniss*, 15 *Wend. R.*, 137; *Covill v. Hitchcock*, 23 *id.*, 611; *Abb. on Ship.*, 360.) But an actual delivery of the goods to the vendee, or a constructive delivery to him, by a delivery to his agent who is authorized by him to receive the goods as such agent, and not as a mere middle-man, puts an end to the vendor's right."[1]

The demand of the goods made by the vendor or his agent upon any person having the charge of them, before the transit is ended, is a sufficient exercise of the right of stoppage *in transitu*.[2] In order to make the notice effectual it must be given either to the person who has the immediate custody of the goods, or to the principal whose servant has such custody, at such time and under such circumstances that he may with reasonable diligence prevent the delivery of the goods to the vendee.[3] After such reasonable notice, if the middle-man notwithstanding it make a delivery, without having the consent of the vendor, he renders himself liable.

The delivery at the place of ultimate destination to a warehouse-man or wharfinger, who does not receive the goods as the mere agent of the purchaser, but in the ordinary course of his business as a middle-man, is not a constructive delivery to the purchaser, so as to put an end to the right of stoppage *in transitu*.[4] So, the warehouse-man receiving the property at the place where it is directed to be sent, that not being the place of ultimate destination, is a middle-man,

[1] 5 Denio R., 630.

[2] Newhall v. Vargas, 13 Maine R., 93.

[3] Whitehead v. Anderson, 9 Mees. and Welsb. R., 518.

[4] Edwards v. Brewer, 3 Mees. and Wels. R., 375; 2 id., 622; 2 Scott R., 146; 7 id., 577.

from whom the goods may be reclaimed. It seems that in an action of trover against the sheriff for seizing the goods on an execution against the vendee, while in the hands of such warehouse-man, the vendor, having served a notice on the sheriff claiming the right of stoppage *in transitu*, cannot on the trial show that the purchase was fraudulently made.[1]

Where goods, arriving at their journey's end, are stowed in a warehouse which the consignee is accustomed to use as his own, or are placed upon a wharf from which the consignee is to take them, the transit is at an end; for that is a delivery of the goods.[2] In short, the right of stoppage ends with the delivery, and continues until the delivery is complete, which is usually evidenced by the payment of the freight.[3] If the consignee intercept the goods on their journey, and take them into his custody, this of course terminates the right of stoppage in the transit, since it is the taking of actual possession of the goods.[4]

It is laid down as a general proposition that the carrier cannot dispute the title of the party who delivers goods to him for carriage.[5] But this rule must be taken with considerable allowance. He is not permitted to set up an adverse title in himself, so as to evade or annul the contract of bailment under which he received the goods. But where the property is taken from his possession by a paramount title in some third person, it is clear that he cannot be compelled to deliver the property under his contract.[6] To hold him answerable in such a case would be to require him to guarantee the bailor's title, and restore to him in some cases property which he did not own; thus compelling him by process of law to answer for the property to the owner by virtue of his title, and to the bailor by virtue of his con-

[1] Covill v. Hitchcock, 23 Wend. R., 611; 20 id., 167.

[2] Rowe v. Pickford, 8 Taunt. R., 83; Sawyer v. Joslin, 18 Vermt. R., 172.

[3] Crawshay v. Eades, 1 Barn. and Cress. R., 181.

[4] 3 Bos. and Pull. R., 42; Foster v. Frampton, 6 Barn. and Cress. R., 107.

[5] 2 Kent's Comm., 605.

[6] Edson v. Weston, 7 Cowen R., 278; Wilson v. Anderton, 1 Barn. and Adolph. R., 450; Whittier v. Smith, 11 Mass. R., 211; Story on Bailm., § 582.

tract — a rule of liability to which even the borrower is not subject.[1]

Though the carrier is bound by the contract of bailment to carry and deliver the property safely, his responsibility to the law of the land is of a prior and superior authority, which does not admit any right arising out of contract in contravention of its command.[2]

The Carrier's hire or reward.

In many of the earlier cases the decisions proceed upon the ground that the true principle on which the carrier's responsibility arises, is the reward he receives for the carriage or transportation of property.[3] Hence, where the value of the goods delivered to him was fraudulently concealed, or misrepresented, it was considered that as his warranty and insurance were in respect of the reward, and as the reward ought to be proportioned to the risk incurred, such fraud and concealment annulled the contract altogether, and relieved the carrier. More recently the public employment exercised by the carrier, and the danger of his combining with robbers, to the great detriment of commerce and the extreme inconvenience of society, are deemed the true ground of his responsibility.[4]

The hire, price or reward for the carriage, is of the essence of the carrier's contract; he is not a common carrier unless he carries for all persons indiscriminately for hire.[5] It is not, however, necessary that the hire should be for a fixed sum; it is sufficient, if the compensation be a *quantum meruit*, inuring to the benefit of the owners.[6] Though there be no express contract for hire, the character of the carrier is such that the law implies an undertaking or promise to pay him

[1] Shelbury v. Scotsford, Yelv., 23.

[2] Taylor v. Plummer, 3 M. and Selw., 562.

[3] Jeremy's on the Law of Car., 33; Jones on Bailm., 102; 4 Burr., 2299; Carth., 485.

[4] Jones on Bailm., 104; Riley v. Horne, 2 Moore and Payne, 333; 5 Bing. R., 217.

[5] 1 Wend. R., 272; 7 N. Hamp. R., 157; 3 Barb. R., 388; 1 Pick. R., 50.

[6] 2 Story R., 16; 2 Wend. R., 327.

a reasonable reward for the carriage of the goods delivered to him.[1]

The carrier's duty to receive and carry all goods tendered to him, of the kind he usually carries, is qualified by his right to demand prepayment of his hire or compensation.[2] But if he omit to demand prepayment, and refuse to receive the goods, a general tender of a reasonable reward for the carriage will be sufficient to charge him in an action for a refusal.[3] Having received the goods for carriage without a prepayment of his hire or freight, the law gives him a right to demand his compensation on the delivery of the goods at the place of destination.[4] And this right is secured by a lien given to him on the property.

The carrier, under a bill of lading by the terms of which the cargo is to be delivered to the consignee on the payment of the freight, has a right to demand the payment of his freight as a condition of the delivery.[5] But he may also collect the freight of the consignor, where the goods are owned by him and shipped for his account and benefit; though it seems, it is his duty in all cases to endeavor to get the freight of the consignee.[6] The right to retain goods for the freight grows out of the usage of the trade, and is waived or surrendered by an agreement regulating the time and manner of paying the freight, the cargo in the meantime to be delivered before the stipulated time for the payment of freight arrives.[7] Such an agreement is an express renunciation of the carrier's lien.

No freight is due for goods which perish by the perils of the sea during the course of the voyage; but the damaged condition of the cargo on its arrival does not deprive the carrier of his right of compensation for the carriage.[8]

[1] 2 Ld. Raym., 909; 2 Shower R., 81, 129; 3 Kent's Comm., 219.

[2] 19 Wend. R., 239; 2 Kent's Comm., 599.

[3] 10 N. Hamp. R., 481; 12 Mees. and Welsb. R., 766; 5 Bing. R., 217.

[4] Jeremy on Car., 84.

[5] Clarkson v. Coles, 4 Cowen, R., 470; Chandler v. Talbot, 18 John. R., 157; Barker v. Havens, 17 John R., 234.

[6] 17 John., R., 234.

[7] 18 John. R., 157.

[8] Frith v. Barker, 2 John. R., 328; Luke v. Lyde, 2 Burr., 882.

Under a charter-party, by which a vessel is chartered for an entire voyage, as from New-York to St. Domingo and back again, for a given sum payable after the termination of the return voyage, no freight becomes due where, the port of destination being blockaded, the vessel is compelled to return to the place of departure.[1] The blockade of the port of discharge dissolves the charter-party; but the return of the cargo to the port of lading is not such a benefit to the owner as will raise an implied promise to pay freight.

The terms of the charter-party regulate the rights of the parties under it, in respect to freight and the time of its payment; but in the absence of any express agreement between them, it becomes due on the arrival of the goods at the place of destination.[2] If the freight is paid in advance, on a contract for the carriage and delivery of goods, and the vessel is shipwrecked and the voyage broken up, the shipper is entitled to a return of the freight, the consideration, that is, the carriage and delivery, having failed.[3] Not so, where the owner of the vessel provides another to take on the cargo and complete the transportation.[4]

The party who actually receives the goods under a bill of lading, which is by its terms assignable, becomes thereby a party to its stipulations respecting freight.[5] A bill of lading under which the goods are deliverable to the shipper's order, or to his assigns, on paying freight, may be transferred by indorsement from party to party, without rendering each person to whom it is assigned, answerable for freight; the carrier's contract in the first instance is with the shipper, and afterwards with the assignee holding the bill of lading and receiving the goods under it. So, where by the terms of the bill of lading the goods are deliverable to the consignee, or to his order, on payment of freight, the party receiving

[1] Scott v. Libby, 2 John. R., 336.

[2] Angel on the Law of Car., § 399; 1 John. R., 24; 2 id., 352.

[3] 3 John R., 335.

[4] 9 John. R., 210.

[5] Tobin v. Crawford, 5 Mees. and Welsb. R., 235; 9 id., 716.

them, whether the consignee or an indorsee to whom the bill of lading has been transferred by the consignee, makes himself responsible for the payment of the frieght.[1] The law implies a promise on his part to pay the freight, such being the terms on which, by the bill of lading, the goods are to be delivered. The person who accepts and receives the property, thereby makes himself a party to the contract.[2]

The consignee is presumptively the owner of the property shipped; but this presumption may be rebutted.[3] And where he is only an agent, without interest, he cannot be charged with the payment of freight.[4] If he refuse to pay the freight, the carrier has his election to retain the goods and insist on his lien, or to deliver them and look to the consignor for his hire.

Where the owner of a canal boat contracted to carry property from Buffalo to Albany, and in the course of the trip, after he had lost a part of the property, sold his boat, the remainder of the cargo being on board, to another person, who received the bill of lading and an order from the shippers of the cargo on the consignees for the amount due for freight, and then performed the remainder of the trip and delivered the bill of lading, with the residue of the property, to the consignee; it was adjudged that the purchaser stood in the place of the former owner of the boat in respect to the claim for freight, and could only recover where such former owner could recover, being entitled to freight *pro rata* for the goods delivered and liable to a recoupment of damages on account of the property not delivered.[5] It appeared, however, in the case, that the shippers gave to the purchaser of the boat, after the purchase, an order on the consignee to pay the amount of the freight to him on the delivery of the cargo with the original bill of lading. By the purchase and the

[1] Merian v. French, 4 Denio R., 110; Cock v. Taylor, 13 East R., 399.

[2] Trask v. Duval, 4 Wash. C. C. R., 184.

[3] Price v. Powell, 3 Comst. R., 322.

[4] Ward v. Felton, 1 East R., 507; Coleman v. Lambert, 5 Mees. and Welsb., 502; Amos v. Tempperly, 8 id., 798.

[5] Hinsdell v. Weed, 5 Denio R., 172.

order, the purchaser was considered to have been substituted in place of the original owner of the boat.[1]

The receipt given or bill of lading signed by the carrier, may be negotiated and transferred by an assignment of the bill, or even by a delivery thereof with intent to pass the title.[2] And this may be done so as to transfer the title to the cargo at any time before it has reached the consignee. A, the owner of two hundred barrels of flour, delivered the same to a forwarder at Rochester, and took a receipt expressing that the flour was to be sent to the defendant at Albany; the defendant being the factor to whom A usually consigned flour for sale, and A being indebted to him for advances on previous consignments. A on the same day drew upon the defendant against the flour and procured the plaintiff's bank at Rochester to discount the draft, on delivering to the bank the forwarder's receipt and agreeing that the bank might hold it as security for the acceptance of the draft. The defendant refused to accept the draft, but subsequently received the flour and converted it to his own use, having notice of the transaction with the plaintiff's bank; and it was adjudged that the defendant was liable to the plaintiffs in trover for the flour, they having acquired the title to it.[3]

The shipper may at any time, before the delivery of the the goods, change his purpose and order a delivery to another person; the original consignment does not bind him, and is not irrevocable in its nature.[4] Where the consignor is the owner of the goods, the consignment only shows that the consignee is thereby constituted an agent to receive and sell the goods and account for the proceeds.[5] If in such

[1] 5 Denio R., 177. The order given to the purchaser made him the carrier, so far as the shippers were concerned; and it is to be inferred that by the purchase and receipt of the bill of lading, he took the right to freight already earned, but not yet due.

[2] Bank of Rochester v. Jones, 4 Comst. R., 497.

[3] 4 Denio R., 489; and 4 Comst. R., 497.

[4] Mitchell v. Ide, 11 Adolph. and Ellis R., 888.

[5] Conrad v. The Atlantic Ins. Co., 1 Peters' R., 444; 7 Cowen R., 328; 2 Hill R., 151.

cases the consignee pays the freight, he acquires a lien on the goods for the amount of his commissions and charges.

It occasionally happens that the carrier's vessel, by reason of some disaster arising from the perils of the sea, is compelled to enter a port short of the place of destination, and disabled from prosecuting the voyage; here, if the owner voluntarily receives the goods he is bound to pay freight *pro rata*, according to the proportion of the voyage performed.[1] The rule is that unless the freight be wholly earned by a strict performance of the voyage, no freight is due or recoverable; nor can a promise to pay *pro rata*, be implied, unless the goods are voluntarily accepted at such imperfect stage in the execution of the contract.[2] If a freighted ship becomes accidentally disabled on its voyage, without the fault of the master, he has his option of two things, either to refit his own vessel, if that can be done within convenient time, or to hire another ship to carry the goods to the port of delivery.[3] This right enables him to protect himself against the loss of freight already in part earned, and empowers him to make such terms with the owner of the cargo as may be reasonable and just; for he may even insist upon the payment of full freight as a condition of surrendering the property.[4]

In order to entitle the carrier to a *pro rata* freight, where the vessel puts into an intermediate port in a disabled condition, the acceptance of the goods by the owner must, as we have said, be perfectly voluntary.[5] If the owner is compelled to accept the cargo under disadvantageous circumstances, and for his own protection, the law will not raise an implied promise to pay a *pro rata* freight; since such an implication is always grounded on some beneficial service rendered by the party in whose favor it is raised.[6]

[1] Robinson v. Marine Ins. Co., 2 John. R., 323; Osbord v. Groning, 2 Campb., 466.

[2] Jeremy on Car., 84.

[3] Luke v. Lyde, 2 Burr. R., 881.

[4] 2 Burr. R., 881; 3 John. R., 335.

[5] Welsh v. Hicks, 6 Cowen R., 504; 9 John. R, 186.

[6] 2 Campb. R., 466; Jeremy on Car., 88, 89.

It seems that by the marine law an incohate right to freight attaches from the ship's breaking ground, and is consummated upon her arrival at the port of destination. By that law parties may recover, *pro rata*, if the voyage be interrupted; and by the common law, where a contract cannot be performed, a meritorious consideration does sometimes arise, to entitle a party to recover in assumpsit for work and labor after the contract has been broken; as where the shipper has the advantage of the carriage, though the original contract be gone, the master is entitled to a recompense; not, however, on the footing of the old contract, but on a new contract which springs out of it.[1] The voluntary acceptance of the goods by the owner at the port of necessity rescinds the charter-party and recognizes the beneficial service of the carrier, so as to entitle him to recover a compensation for the carriage of the goods over that part of the voyage already accomplished.[2]

In one case the rule adopted for ascertaining the amount of freight earned, was to ascertain how much of the voyage had been performed, when the disaster happened, which compelled the vessel to seek an intermediate port; but the true rule is to ascertain how much of the voyage has been performed when the goods arrive at the port where they are accepted; because *that* is the extent of the voyage, as it respects the interest of the shipper.[3]

The event on which *pro rata* freight is claimed, is not provided for in the contract between the parties. There may not, therefore, be any positive claim for it on an abandonment of the voyage at an intermediate port; yet there is a demand in justice, if the abandonment be not the fault of the master or ship-owner; and the act of acceptance by the owner of the goods works a legal claim. The action on this new contract, implied by law, is an equitable one. It rests on the ground of benefit to the owner or consignee of

[1] 2 Campb. R., 466; 2 Burr. R., 881; 7 Term. R., 377; 5 East R., 316; 10 id., 526.

[2] 9 John. R., 186; Williams v. Smith, 2 Cai. R., 13.

[3] Robinson v. Marine Ins. Co., 2 John. R., 323.

the goods; and hence the circumstances attending the acceptance of the goods at the intermediate port, and the conduct of the master in neglecting or refusing to repair his vessel are to be submitted to the jury to determine whether such acceptance was voluntary or not.[1]

Passage money, and freight which is the hire or reward paid to the master and owners of vessels for the transportation of goods by ships and vessels, and the price paid to the carrier for the carriage of goods by land, are regulated by the same general principles, and recoverable under the like circumstances.[2] Where there is an agreement between the parties in respect to freight, or hire to be paid, the rights and duties of each grow out of the written stipulations between them.[3] In the absence of any express contract, the hire or freight becomes due on the delivery at the place of destination.[4] If paid in advance at the port of lading, it may be recovered back if not subsequently earned.[5]

Carrier's Lien.

It is laid down as a general rule, that wherever any one is obliged to receive goods, to perform any duty on them, he has a lien on them at common law. For as that imposes the burden, it also gives him the power of retaining for his indemnity. The carrier's lien is for the price or hire due for the carriage or transportation of the particular goods on which it rests.[6] It is a particular or specific lien on the goods carried for the price of their carriage, entitling the carrier to detain them until he has been paid therefor. It grows out of a general custom, established by the policy of the law, for the protection of the bailee, and is favored by

[1] 6 Cowen R., 504.

[2] Mulloy v. Backer, 5 East R., 321; Moffatt v. East India Co., 10 East R., 468; 3 John. R., 335; 1 Peters' R., 126; 3 Pick. R., 20.

[3] Burgess v. Gun, 3 Harr. and Johns. R., 225; 10 Watts' R., 384; 13 East R. 567; 8 Term R., 445; 1 Taunt. R., 300.

[4] Lane v. Penniman, 4 Mass. R., 91; 2 Sumner R., 589.

[5] Jeremy on Car., 85, 86; 1 Campb. R., 84.

[6] Hartshorne v. Johnson, 2 Halst. R., 108.

the courts in furtherance of substantial justice.[1] General liens, on the other hand, are not favored, such as liens for a general balance claimed by a carrier, which can only be established by evidence of usage from which the jury may infer that it was in fact made a part of the contract between the parties.[2] As such a usage of particular persons trenches upon the common law, it must be established by clear and affirmative evidence, so as to give it the force of a positive agreement.[3]

Where a cargo consists of several kinds of goods consigned to one person, who has transferred a part of the bill of lading to another, the carrier cannot, after having delivered the part of the cargo transferred, retain the residue for the entire freight. But when the whole is to be delivered to one person, under a single consignment, then, although a part has been delivered, he may retain the residue until the freight for the whole be paid him.[4]

The right of lien is one of the terms implied by law in the contract, but may be waived by a special agreement inconsistent with its existence.[5] It accompanies the possession, but is not extinguished by a delivery of the goods to an agent with notice of the lien and for the purpose of preserving it.[6] So, also, the lien of the master of a vessel on a a cargo for freight and charges, may be assigned; and an action of trover for the cargo cannot be maintained against the assignee, unless before suit brought the lien be discharged, or a tender in satisfaction is made. The lien is not waived by the mere omission to place the refusal, to deliver or to account, on the specific ground of lien. The doctrine that a party shall not be permitted at the trial to assume a distinct ground of defence from that set up when a demand is made, applies only where he puts his right upon some

[1] Jeremy on Car., 70, 71.
[2] Aspinall v. Pickford, 3 Bos. and Pul., 44.
[3] Rushforth v. Hadfield, 6 Term R., 519; Jeremy on Car., 71; 8 Term R., 330.
[4] 6 East R., 622.
[5] 1 Maule and Sel., 543; 16 Ves., 275.
[6] M'Combie v. Davis, 7 East R., 6.

distinct ground at the time of demand, and not when he merely omits to assert the precise nature of his claim.[1]

The received definition of a lien on goods and chattels, namely, "the right of one man to retain property in his possession belonging to another, until certain demands of the party in possession are satisfied," implies that it must cease when the possession is relinquished.[2] If the property be delivered to the owner or consignee before the payment of hire or freight, the delivery is a release of the lien.[3] This, as a general rule, is entirely settled. By a transfer of the possession the holder is deemed to yield up the security he has by means of the custody of the property, and to trust only to the responsibility of the owner, or other person liable for the charge.[4] The delivery is a waiver of the lien, unless it is procured by fraud.[5] If the carrier be induced to deliver goods to the consignee, by a false and fraudulent promise of the latter, that he will pay the freight as soon as they are received, the delivery will not amount to a waiver of the carrier's lien, but he may disaffirm the act and replevy the goods. The delivery procured by fraud, is void at his election.[6]

When a sale is procured by fraud, no title passes to the vendee.[7] And it is doubted whether a purchase, obtained by fraud, operates to change even the possession; it certainly does not as between the owner and the fraudulent purchaser.[8] On the same principle, if the consignee by a trick or deceitful promise, obtains the delivery of goods from a carrier, he is at liberty to disaffirm the act and retake the actual custody of them.

When the general owner of a vessel parts with her under a charter-party for a specified time or for a given voyage,

[1] Everett v. Coffin, 6 Wend. R., 603, 608; 1 Camb. R., 410; 2 Johns. Cas., 411.
[2] McFarland v. Wheeler, 26 Wend. R., 467; 1 East R., 14; 2 id., 235.
[3] Herbert v. Hallett, 3 Johns. Cas., 93.
[4] Sweet v. Pym, 1 East R., 4; Dicas v. Stockley, 7 Car. and Payne, 587.
[5] Bigelow v. Heaton, 4 Denio R., 496.
[6] 6 Hill R., 43.
[7] Root v. French, 13 Wend. R., 570.
[8] Ash v. Putnam, 1 Hill R., 302.

and delivers the possession and control of the vessel to the charterer, the latter is considered the owner for the voyage, and has a lien for freight; or he may maintain an action for it where he has delivered the cargo.[1] In Marcadier v. The Chesapeake Insurance Company, it is adjudged, that "a person may be owner for the voyage, who, by a contract with the general owner, hires the ship for the voyage and has the exclusive possession, command and navigation of the ship. But where the general owner retains the possession, command and navigation of the ship, and contracts to carry a cargo on freight for the voyage, the charter-party is considered a mere affreightment, sounding in covenant; and the freighter is not clothed with the character or legal responsibility of ownership. In the first case, the general freighter is responsible for the conduct of the master and mariners during the voyage. In the latter case the responsibility rests on the general owner."[2]

If the vessel is in effect let to hire for a voyage or for a term, the charterer acquires for the time being a property in the vessel, and stands in the place of its owner;[3] and is entitled to demand and collect the freight. Whether he is to be considered the owner or not, depends upon the terms of the charter-party and the interest which is given to the charterer under it.[4]

The carrier has a lien on a passenger's baggage for his fare, and may detain it in his possession until the same has been paid; but he cannot detain the person of his passenger, nor can he seize any property belonging to him which has not been delivered into his custody, as a security for the passage money.[5] The contract for the carriage of the passenger and his baggage is one and entire; and since, in contemplation of law, the compensation for the conveyance of

[1] Clarkson v. Edes, 4 Cowen R., 470.

[2] 8 Cranch R., 49.

[3] 8 John. R., 276; 1 id., 238; Gacie v. Palmer, 8 Wheat. R., 605; 1 Cranch R., 214; Vallejo v. Wheeler, Cowp. R., 143; Hutton v. Bragg, 7 Taunt. R., 14.

[4] 4 Cowen R., 470, and the authorities there cited.

[5] Wolf v. Summers, 2 Campb. R., 631; Mason v. Thompson, 9 Pick. R., 288.

luggage is included in the fare, the carrier has a lien on the luggage for the amount due him.[1] Whether the delivery of the baggage be considered an independent bailment of goods to be carried, or only accessory to the contract for the carriage of the person, the lien would attach in either case; but on the theory of a separate contract, on which some of the earlier cases were decided, the lien would be confined to the price or compensation for the carriage of the baggage.[2]

In truth, there is but one contract, which is indivisible, and covers both the freight and fare. In one case, being an action of trover against the master of a vessel, for a writing desk and a trunk, containing wearing apparel, detained for passage money, Lawrence, J., said: "The master of a ship has certainly no lien on the passenger himself, or the clothes which he is actually wearing when he is about to leave the vessel; but I think the lien does extend to other property which he may have on board, and in refusing to deliver them up he is not guilty of any tortious conversion."[3] Passage money and freight are the same thing in legal effect, but there is no lien upon the person for either of them.

The carrier's lien is, as we have said, the right to detain the goods intrusted to him, until his hire or reasonable reward has been paid; it is a means of enforcing payment, but does not authorize him to sell the goods for the purpose of paying himself.[4] It is neither a *jus ad rem*, nor a *jus in re*, but a simple right of detainer; hence, it is not attachable as personal property, or as a chose in action of the person who is entitled to it.[5] True, the carrier has a special property in the goods intrusted to him, whilst in his possession, so that he may maintain an action against any one who interferes with them, or for any injury done in respect of such goods.[6]

[1] 9 Wend. R., 85.

[2] Middleton v. Fowle, 1 Salk., 182; 2 Bos. and Pull. R., 419.

[3] 2 Campb. R., 631.

[4] Yelv., 67; Jones v. Thurloe, 8 Mod. R., 172; Jones v. Pearle, 1 Str., 556; Chase v. Westmore, 5 Maule and Selw., 185.

[5] Meany v. Head, 1 Mason R. 319.

[6] Taylor v. ———, 2 Ld. Raym., 792.

This right of action, however, is given for the defence of the property, and is based upon the bailee's right of possession.[1]

It is evident that the lien of the carrier cannot be separated from the demand for hire or reward, since it is only a right accessory to that demand, accorded to the carrier as a security for its payment.[2] As it grows out of the relation between the carrier and his employer, it cannot be continued after that relation has terminated; but this relation is determined only by a voluntary delivery made by the carrier, or by a tender to him of his reasonable reward. Even the right of stoppage *in transitu* does not supersede the lien for freight, or the price of the carriage.[3]

Where there is a prior agreement between the parties by which the freight or hire for the transportation of goods is to be paid on a credit of thirty, sixty and ninety days, no lien of any kind attaches to the property.[4] Having trusted to the personal responsibility of the owner, the carrier stands in the same situation as he does after having voluntarily delivered the goods at the end of his route, waiving the prepayment of his hire or reward.[5] The fixing of a future time of payment, being inconsistent with the right of lien, destroys it.

Remedies against the Carrier.

In an action against a common carrier for refusing to receive goods for carriage, it is necessary that the complaint should allege facts sufficient to constitute a cause of action; it must allege that the defendant was a common carcarrier, at the time in question, of goods and chattels of the kind tendered to him, specifying his route; that the plaintiff tendered to him as such common carrier at a certain place, to be named, where he was accustomed to receive such

[1] Jeremy on Car., 125.

[2] 1 Mason R., 319.

[3] 3 Bos. and Pull. R., 49.

[4] Chandler v. Belden, 18 John. R., 157.

[5] Kinlock v. Craig, 3 Term R., 119; 1 East R., 4; 8 Taunt. R., 293; Blake v. Nicholson, 3 Maule and Selw., 168; 5 id., 180; 4 Barn. and Ald., 50; 3 Verm. R., 302; 2 Kent's Comm., 635.

articles, goods of a certain value for carriage to a given place on his route; that the defendant had the convenience for receiving and conveying the same as requested; that the plaintiff was ready and willing, and then offered to pay to the defendant such sum of money as the defendant was legally entitled to receive for the receipt and carriage of the goods; and that the defendant, not regarding his duty as such common carrier, neglected and refused to receive and carry the goods; whereby the plaintiff was forced and compelled to carry the goods himself at great expense, and was injured and damaged to the amount sought to be recovered.[1]

It is not necessary to aver a strictly legal tender, a term which is only applicable where an absolute duty, such as the payment of an antecedent debt, is imposed on the party making it. The acts to be done by both parties, namely, the receipt of the goods, and the payment of a reasonable sum for their carriage, being contemporaneous acts; the carrier being bound to receive the goods on the money being paid or tendered, and the bailor to pay the reasonable amount demanded, on the carrier's taking charge of the goods; it is enough to aver readiness and an offer to pay. It would be repugnant to common sense to require the party offering goods for carriage to go through with the useless ceremony of laying down the money, in order to take it up again, where the party to whom they are offered refuses to accept the goods.[2]

Where the carrier's service is to be performed mainly within the limits of tide water, the proceedings against him may be had in admiralty, either *in rem* against his vessel, or *in personam* against the master and owners. The principles applicable are the same as at common law. The libel, in the form of a petition to one of the judges of the court,

[1] Pickford v. The Grand Junction Railway Company, 8 Mees. and Welsb. R., 372. The substance of the declaration in this case is stated in the text; the action was decided on a special demurrer, assigning for cause that plaintiff did not aver a tender; held that the law does not demand in such a case a strictly legal tender.

[2] Rawson v. Johnson, 1 East R., 203; 7 Taunt. R., 314; 2 Bos. and Pull. R., 447.

sets forth the cause of action with proper allegations to bring the action within the jurisdiction of the court. The answer of the respondents, in form very nearly the same as in equity practice, is then filed, admitting the allegations which are not denied and avering the facts constituting the defence.[1]

But the usual remedy against the carrier is by an action at law, grounded either on the contract, as an action of assumpsit, or on his public duty, as an action on the case.[2] The action in the nature of trover may also be sustained against him, where it can be shown that he has been guilty of a conversion of the property.[3]

The breach of his public duty is a tort, for which the carrier is liable to an action on the case, founded upon the custom.[4] Since the abolition of the forms of action and pleading heretofore used in this state, we have nominally no distinction between one kind of action and another; but inasmuch as the law establishing the rights of parties remains unchanged, it is still just as essential and important as ever that the pleadings should be drawn so as to raise a right of recovery recognized by the law.[5] In doing this it is indispensable that every fact should be alleged which is requisite to constitute the cause of action.[6] If more than one cause of action be stated in the complaint, each cause of action must be stated separately; and so in respect to the answer, each defence or ground of defence must be stated separately.[7]

Under the Code of Procedure the plaintiff may unite several causes of action in the same complaint, where they

[1] The New Jersey Steam Navigation Co., respondents and appellants v. The Marchants' Bank of Boston, 6 Howard's Rep., 344; Citizens' Bank v. Nantucket Steamboat Co., 1 Story R., 16.

[2] Ross v. Johnson, Burr., 2825.

[3] Baldwin v. Cole, 6 Mod. R., 212; Richardson v. Atkinson, 1 Str. R., 576; Packard v. Getman, 6 Cowen R., 757.

[4] Jeremy on Car., 116.

[5] Hall v. Southmayd, 15 Barb. R., 32.

[6] Barker v. Russell, 11 Barb. R., 304; 7 id., 80; Russell v. Clapp, 7 id., 482.

[7] Boyce v. Brown, 7 Barb. R., 80; 5 Barb. R., 375.

all arise out of contract, express or implied; but he cannot allege in the same complaint a cause of action arising on contract, and another for injury to property with or without force; nor can he in an action to recover personal property, with or without damages for the withholding thereof, insert a count for injury to the same.[1]

In general, the plaintiff must now state in his complaint all the facts which constitute his cause of action, whether arising *ex contractu* or *ex delicto;* and every fact is to be deemed constitutive, in the sense of the Code, upon which the right of action depends. Every fact which the plaintiff must prove to enable him to maintain his suit, and which the defendant has a right to controvert in his answer, must be distinctly averred; and every such averment must be understood as meaning what it says, and, consequently, is only to be sustained by evidence which corresponds with its meaning.[2]

Action on the Case.

This form of action, against common carriers, is of very ancient use, and proceeds on the theory of charging them with the breach of a public duty, growing out of their employment, and imposed by law. The action is in some respects more convenient than an action founded on contract, which is of modern use.[3] The action on the case is for a tort or misfeasance, while a suit in assumpsit is always brought for the breach of either an express or implied promise.

The form of action against a common carrier, is a question which has been considerably agitated in the English courts, and has been different as the *gravamen* was supposed to arise upon a breach of public duty, or the breach of mere express promise. Each form has its advantages and disadvantages. If assumpsit is brought, or the action be laid as arising upon contract, it may be abated for the non-joinder

[1] See Code of Procedure § 167.

[2] Garvey v. Fowler, 4 Sand. R., 665.

[3] Bretherton v. Wood, 3 B. and Bing. R., 54.

of proper parties; but it survives against the personal representatives, and the common counts, on a general undertaking may be joined in the declaration. If the action be laid as arising *ex delicto*, and founded on the custom, the suit does not abate for the non-joinder of all the proper parties; and, in a proper case, a count in the nature of trover may be joined.[1]

In an action against six defendants, as proprietors of a steamboat, in which they were charged as common carriers, for the loss of property put on board for transportation, and the *gravamen* was stated to have arisen from a breach of duty, it was held, that a plea in abatement for the non-joinder of other proprietors, who were jointly liable with the defendants, was bad; that the action being several as well as joint, the demurrer to the plea in abatement was well taken.[2]

An action solely upon the custom, is an action of tort, in which all or any number of the owners of a vessel, coach or other kind of conveyance, used by common carriers, may be sued, and on a verdict against all or a part only of those against whom the action is brought, judgment may be rendered. The plainiff has his choice of remedies, either to bring an action in the nature of assumpsit or case; but when one or the other form of action is adopted, it will be governed by its own rules. If the plaintiff, as is sometimes done, states the custom, and also relies on an undertaking, general or special, the action, though it may be said to be *ex delicto quasi ex contractu*, is in reality founded on the contract, and is treated as such.[3]

In an action on the case founded on the custom, the complaint alleges that the defendant was a common carrier of goods and chattels on a certain route, and that plaintiff's goods were delivered to him for carriage to a given place for a certain freight and reward, whereby it became the de-

[1] Orange Bank v. Brown, 13 Wend. R., 158; Boson v. Sandford, 2 Show., 478; 1 Show., 29, 101; 3 Mod., 321; 2 Salk., 440.

[2] 3 Wend. R., 158.

[3] Max v. Roberts, 12 East R., 89, decided in 1810.

fendant's duty to carry and deliver the goods safely at the place of destination, and concludes by alleging a breach of duty to the plaintiff's damage. The plea or answer is, not guilty of the breach of duty.[1] A breach of this duty is a breach of the law; and for this breach, an action lies, founded on the common law, which action wants not the aid of a contract to support it.

It is not necessary in such an action to prove a contract, nor even to allege a consideration, for the negligence or breach of duty is the cause of action, and not the assumpsit.[2] It is sufficient, therefore, to establish by pleading and proof, that the defendant received the plaintiff's goods as a common carrier for transportation, and has been guilty of a breach of his duty, resulting in damages to the owner of them.[3] Without any agreement whatever, the bare delivery of the goods to the carrier, imposes upon him the obligation to convey and deliver them according to the directions which he receives; and a neglect to perform his duty and comply with such directions subjects him to an action. For the law pronounces his failure in duty a tort or misfeasance, for which he must answer in damages to the party injured.[4]

There is this further convenience attending an action on the case; it is enough that the proof conforms substantially to the averments in the complaint;[5] while in an action on a contract the proof must conform closely to the allegations, and a variance will be extremely inconvenient, if not fatal.[6]

It has also been customary, and in many cases found quite convenient, to join in this action with counts against the

[1] Bretherton v. Wood, 5 Brod. and Bing. R., 54, decided in 1821; Jeremy on Car., 117; McCall v. Forsyth, 4 Watts and Serg. (Penn.) R., 179; Smith v. Seward, 3 Barr. R., 342.

[2] Bastard v. Bastard, 2 Show., 81; Jeremy on Car., 5; 5 Brod. and Bing. R., 54.

[3] Weed v. The S. and S. Railroad Co., 19 Wend. R., 540.

[4] Coggs v. Bernard, 2 Ld. Raym., 909; see also the old forms of a declaration in case against a common carrier, 1 Chitty Pl., 248.

[5] Cook v. The Champlain Trans. Co., 1 Denio R., 91; 8 Mees. and Welsb. R., 443.

[6] 19 Wend. R., 540.

defendant as a common carrier, a count in trover.[1] Trover was held to lie where the goods had been lost to the owner by the act of the carrier, though without any intentional wrong; as where they had been delivered to the wrong person by mistake, or on a forged order, or had been tortiously converted by him.[2] It did not lie for the mere omission of the carrier; as where the property had been stolen, or lost through his negligence, and so could not be delivered to the owner. Mere non-feasance does not work a conversion of the property; and hence, although the owner might maintain an action of another kind, it was ruled that he could not maintain trover.[3] A recovery on a count in trover could be had only where the defendant had been guilty of an act of conversion. The goods being in his possession, evidence of a demand and refusal is *prima facie* proof of conversion.[4] This proof may be overcome by any testimony that shows he did not in fact convert them.

It is not easy to determine how far, under the recent Code of Procedure in this state, causes of action heretofore capable of being joined, may now be united in the same complaint. In general terms, it may be stated that the plaintiff cannot, in an action to recover personal property, allege a cause of action for injury to property, arising through his neglect with or without force. In an action for the recovery of goods and chattels, he may claim "damages for the withholding thereof;" but it is not clear that he may include under that term such damages as have resulted from the negligent manner in which he has stored or transported them.[5]

But the form of the action does not alter the transaction, nor essentially vary the principles applicable to the carrier's liability. Under the old practice, the true test, whether counts might be joined in the same action, was to consider

[1] Hawkins v. Hoffman, 6 Hill R., 586.

[2] Peake Cas., 49; 2 Barn. and Ald., 702; 4 Bing. R., 476.

[3] Ross v. Johnson, 5 Burr, 2525; Dewell v. Maxon, 1 Taunton R., 391; 4 Esp. R., 157; Buller, N. P., 45; 1 Campb. R., 409; 2 Ld. Raym., 792; Jeremy on Car., 120.

[4] Dwight v. Brewster, 1 Pick. R., 50; 6 Hill R., 588.

[5] Code of Procedure, § 167.

whether there might be the same judgment in both or all of them.[1]

Action on the Contract.

An action in the nature of assumpsit lies upon all implied contracts as well as upon all written contracts not under seal, and is based upon the promise or undertaking of the party defendant. It is the usual and well defined remedy for the breach of a contract, whether expressed in terms or raised by implication of law.

Every person who undertakes to carry, for a compensation, the goods of all persons indifferently, is, as to the liability imposed, to be considered a common carrier. There is an implied undertaking on his part to carry the goods safely, and on the part of the owner to pay a reasonable compensation. No special agreement is necessary to enable the owner to maintain assumpsit against the carrier for the breach of his duty, nor to enable the carrier to maintain assumpsit for his compensation. There is, therefore, a perfect contract implied between the carrier and his employer.[2] In like manner a contract to carry the ordinary luggage of the passenger is implied from the usual course of the business; and the price paid for fare is considered as including a compensation for carrying the freight.[3]

It is customary and proper, in an action against the carrier, founded on his contract, to allege by way of inducement that the defendant was a common carrier of goods and chattels, specifying his route;[4] and that the plaintiff delivered to him as such common carrier, and at his request, certain goods, describing them with a certainty of description to a common intent, and specifying their value, to be securely carried and safely delivered to the consignee at the place of destination, to be named; that the defendant in consideration thereof, and of the reward to be paid to him in that behalf,

[1] Dickon v. Clifton, 2 Wils., 319; Govett v. Radnidge, 3 East R., 63.
[2] 3 Wend. R., 161.
[3] 9 Wend. R., 85; 25 id., 459; 6 Hill R., 586.
[4] 1 Chitt., Pl., 115, 418; 2 id., 335, 7th ed.

undertook and faithfully promised the plaintiff to take care of the said goods and chattels, and safely and securely carry and convey, and deliver them for the plaintiff according to his undertaking, and the complaint then concludes by alleging a breach of the undertaking by the defendant, neglecting and not regarding his duty as such carrier. To this is commonly added a general count for not taking due and proper care of the goods; and such other counts, grounded on the contract, as may be applicable to the case.[1]

Proceeding upon a contract, it is necessary to sue all the joint contracting parties, and only such as are liable on the same contract; and the contract must be proved as laid in the complaint.[2] As every legal and valid promise must be supported by a considertion, it is essential that the complaint should aver a consideration as well as an undertaking,[3] and that the consideration should be correctly stated according to the terms of the agreement.[4]

A contract in the alternative, to transport fifteen or twenty tons of marble from one place to another, must be stated in the declaration according to the terms of it. If stated as an absolute contract for the transportation of twenty tons, and not fifteen or twenty tons, the variance is fatal.[5] So, where the declaration stated that in consideration of thirty-five dollars to be paid by the plaintiff, and the agreement of the plaintiff to pay the defendant three dollars per ton, and such canal tolls as should be charged to the defendant, the defendant agreed to transport twenty tons of marble from Fort Ann to Weedsport; and the agreement proved was to transport twenty tons for three dollars per ton and the tolls, and that the thirty dollars should be advanced towards the tolls; the variance was considered substantial and manifest.[6] It is

[1] Pozzi v. Shipton, 8 Adolph. and Ellis R., 963.

[2] Patten v. Magrath, 1 Rice (S. C.) R., 162; Walcott v. Canfield, 1 Conn. R., 194.

[3] Corbett v. Packington, 6 Barn. and Cres. R., 268; Smith v. Seward, 3 Barr. R., 342.

[4] Stone v. Knowlton, 3 Wend. R., 374; Penny v. Porter, 2 East R., 2.

[5] 3 Wend. R., 374.

[6] 3 Wend. R., 375; 3 Term R., 531.

a sufficient averment of a consideration that the defendant, being a common carrier, for a certain hire or reward, received the goods for carriage.[1] If the carrier limits his responsibility, that need not be noticed in the pleading; but if a stipulation be made that, under certain circumstances, as in the case of fire and robbery, he shall not be liable at all, that should be stated.[2]

In brief, when the action against the carrier is based on the contract, either expressed or implied, between the parties, it is sufficient here to say, that the general principles which have been held to govern the action of assumpsit, become applicable; and the plaintiff has the right of uniting in the same suit as many causes of action against the defendant as he may have, belonging to the same class.[3] If the action be brought against several, he must establish a joint liability against all the persons whom he has sued, and the contract must be proved as stated.[4] Though he cannot in the same action state a cause of action not in the same class, he may recover on any evidence which shows a breach of the contract, whether arising through the neglect or wrongful act of the defendant;[5] and the evidence is substantially the same as that required in an action on the case.

Parties to the action.

As a general rule, where goods have been consigned to an individual, the action for a conversion or other injury to the property, must be brought by the consignee. If the goods have been placed at his absolute disposal, and no other fact appears, the legal presumption is that he is the true owner. But there is no positive regulation or commercial usage which determines who shall sue for an injury to the property. Neither the consignor nor the consignee, as such, is to bring the action; but the owner of the goods. The presumption

[1] Clark v. Gray, 6 East R., 564.
[2] Latham v. Rutley, 2 Barn. and Cres. R., 20.
[3] Code of Procedure, § 167.
[4] Wilsford v. Wood, 1 Esp. R., 182.
[5] Sleat v. Fagg, 5 Barn. and Ald. R., 349.

of ownership which results from an unqualified consignment may be rebutted; and whenever it appears that the person suing is the real owner, there is an end to the objection that the action should be brought in the name of the consignee.[1]

If goods be shipped for the account and risk of the consignee, he paying the freight, and it is so expressed in the invoice and bill of lading, the delivery to the carrier is considered as a delivery to the consignee, who alone can bring an action against the carrier, in case they are not delivered. The property, by the bill of lading, is vested in the consignee.[2] Though as between the parties to it the bill of lading is a contract which cannot be varied by parol evidence, it is not conclusive as against the real owner, who may prove his title independent of it, and by such evidence as shows his ownership.[3]

Where a merchant or tradesman orders goods to be sent by a carrier, though he does not name any particular one, a delivery to the carrier operates as a delivery to the purchaser;[4] the property immediately vests in him, and he alone can bring an action for any injury done to the goods, and if any accident happen to them, it is at his risk. The only exception to the purchaser's right over them, is that the vendor, in case of the former becoming insolvent, may stop them *in transitu*.

There being no special agreement with the carrier for the carriage of the goods, the owner of them is answerable to him for his hire or reward, and has a right of action against him either for a failure to perform his legal duty as carrier, or on his implied contract, to carry and deliver the goods safely.[5] If there is an express agreement with the consignor for the carriage of the goods, the action may be

[1] Potter v. Lansing, 1 John. R., 223; Davis v. James, 5 Burr., 2680; Dawes v. Peck, 8 Term R., 330; Everett v. Saltus, 15 Wend. R., 474.

[2] 1 John. R., 216.

[3] Everett v. Coffin, 6 Wend. R., 603.

[4] Dutton v. Solomonson, 3 Bos. and Pul. R., 584; 3 Taunt. R., 423; Ilsley v. Stubbs, 9 Mass. R., 63.

[5] Davis v. James, 5 Burr., 2680; Moore v. Wilson, 1 Term R., 659.

sustained in his name against the carrier;[1] or it may be brought in the name of the consignee as being made in his behalf, where the title is vested in him.

When the consignee is the general owner of the goods, or when by the delivery of the goods to the carrier the property vests in the consignee, it is an inference of law, and not a presumption of fact, that the contract for the safe carriage is between the carrier and consignee, and consequently the latter has the legal right of action; and this, notwithstanding the freight, is to be paid by the consignor and not by the consignee.[2] But if the consignee is in fact a mere agent to receive the goods, having no interest in them, the action against the carrier for their loss, is properly brought in the name of the owner and consignor of the property, whose title may be proved by the testimony of the consignee.[3]

In the case of the sale of goods to be carried to the vendee's place of business, in order to make the delivery to the carrier a constructive delivery to the vendee, it must appear to have been made by his direction or assent.[4] And such direction or assent may sometimes be implied from the course of trade. In some cases, without doubt, an interest in the goods vests in the consignee where the absolute title does not pass to him; as where the consignment to him has been made on an agreement that he shall make advances on the credit of the goods, and hold and dispose of them on commission for his reimbursement. In this case he may maintain an action against any third person who interferes with the property; and the contract to this effect, may be either inferred from circumstances or shown by direct and express agreement.[5]

Where there is a bill of lading specifying the terms of the contract with the carrier, the parties to it are in general

[1] Robinson v. Dunmore, 2 Bos. and Pul. R., 416.

[2] Green v. Clark, 13 Barb. R., 57; 8 Term R., 330

[3] Price v. Powell, 3 Comst. R., 322; 5 Denio R., 172.

[4] 3 Bos. and Pul. R., 582; Hague v. Porter, 3 Hill R., 141; Donner v. Thompson, 2 Hill R., 137; Coxe v. Harden, 4 East R., 211.

[5] Grosvenor v. Phillips, 2 Hill R., 147; Holbrook v. Wright, 24 Wend. R., 169; Haille v. Smith, 1 Bos. and Pul. R., 563; 4 Campb. R., 31, 33.

proper parties to an action founded on the contract. If there is no contract except that which is implied by law, and no bill of lading, the rule seems to be that the consignee is not liable for the freight.[1] But this rule does not apply where the consignee is the owner of the goods; and as he cannot require a delivery of them in any case without paying the freight, the rule is reduced to this: the consignor, being the owner of the goods, is responsible to the carrier for his freight or reasonable reward;[2] but though the contract is with the consignor, the consignee is also answerable for the freight where he accepts the goods;[3] and where he refuses to accept them, the carrier has his lien and a right of action for freight against the shipper.[4]

The contract for the carriage of goods implied by law is with the owner of them, and hence the action in the nature of assumpsit for the enforcement of it should be brought in his name, whether he be the consignor or consignee of the goods.[5] Indeed, the rule is general, that the person who has the legal title, has the right of action.[6] The exceptions to this rule arise out of a special contract, or a right reserved in the vendor of resuming the property whilst *in transitu*. If the carrier enter into a special agreement with the consignor for the conveyance and delivery of the goods, he is answerable to him on his contract for its faithful fulfillment, and he is not permitted to dispute his title to the property.[7]

In respect to the parties defendant, care must be taken where the action is in the nature of assumpsit to bring the suit against all who are jointly liable on the contract, so as to avoid the hindrance and delay of a plea in abatement for the non-joinder of the proper parties, and also the more

[1] Coleman v. Lambert, 5 Mees. and Welsb. R., 502.

[2] Shephard v. De Bernales, 13 East R., 508; Barker v. Havens, 17 John. R., 234.

[3] Shields v. Davis, 6 Taunt. R., 65.

[4] 3 John. R., 322.

[5] Jeremy on Car., 123; 3 Comst. R., 322.

[6] Ely v. Ehle, 3 Comst. R., 506; 1 Chitty Pl., 1; 6 Serg. and Rawle R., 429; Duff v. Budd, 6 Moore R., 469; Stephenson v. Hart, 4 Bing R., 476; Vale v. Dale, Cowp. R., 294; 2 Campb. R., 36; 1 Wheat. R., 471.

[7] 3 Campb. R., 320, 528; 8 Term R., 330.

serious consequences of a variance between the agreement set forth and that proved.[1] Where the plaintiff declares against several defendants upon a joint undertaking, he is bound to prove such an undertaking on the trial, or he cannot recover.[2]

Burden of proof.

The burden of proof is imposed upon one party or the other by the substance and form of the pleadings.[3] Upon *non-assumpsit* pleaded to an action on the contract, the plaintiff holds the affirmative of the issue, and the *onus* of making out a promise is upon him; but he does not hold the affirmative of every question that may be made under that issue. The defendant, without at all controverting the promise, might formerly set up payment, release, accord and satisfaction, and other matters of defence under the plea of non-assumpsit; and when he did so, the burden of proof was upon him, to establish his allegation by a preponderance of evidence. And such is the rule in relation to every matter set up as a defence to the action, which does not come in by way of answer to the evidence for the plaintiff. It makes no difference in principle, whether the defence springs out of the contract on which the action is brought, or arises *aliunde*. The burden cannot be changed by the great latitude of defence which is allowed under the plea of non-assumpsit. The substance of the allegation to be tried, rather than the particular form of the pleading, must determine where the *onus* lies; especially in those actions where the defendant is not required to plead the particular matter on which he intends to rely.[4]

It is a general rule of pleading, that a fact asserted on one side, and not denied on the other, is to be taken as admitted,[5] and the issue to be tried by a jury consists of one

[1] Jeremy on Car., 124.

[2] Mitchell v. Ostrom, 2 Hill R., 520, 200; 7 John. R., 468.

[3] Hollister v. Bender, 1 Hill R., 150.

[4] 1 Hill R., 153; Cowen and Hill's Notes to Phil. Ev., 475 to 478.

[5] Raymond v. Wheeler, 9 Cowen R., 295; Code of Procedure, § 168.

or more facts affirmed on the one side, and denied on the other. In actions against common carriers, it is necessary to prove, first, a contract express or implied; second, the delivery of the goods; and third, the defendant's breach of promise or duty.[1] If the plaintiff counts on a special agreement, it must be proved as laid, and no other will be implied.[2]

The plaintiff usually relies upon an implied contract, proving that the defendant is a common carrier, as alleged in the declaration, and that the goods were delivered to him for carriage to the place named, and that they have not in fact arrived.[3] Having shown a state of facts from which the law implies a contract on the part of the carrier to carry and deliver the goods safely at their place of destination, slight evidence is sufficient to cast the burden of proof upon him to answer for the non-delivery. Evidence that the defendant's coachman, on being inquired of for a parcel intrusted to him for carriage, replied that he understood it had been lost, is sufficient in the first instance.[4] And the testimony of the consignee's shopman, that he did not know of the delivery, and believed that he must have known of it, if a delivery had taken place, is prima facie evidence of non-delivery.[5] Though the burden of proof is on the plaintiff to show that the property did not safely reach its destination, it is not material how the fact is proved. Where it was shown that the defendant's boat, in which the property was stowed, had been capsized on the route and the property damaged, and a portion of it carried to a place out of its course, it was ruled sufficient to throw the burden of proof on the defendants to account for the property.[6]

Upon proof of a delivery of goods to a common carrier for transportation, accompanied with evidence that they have not been delivered at their place of destination after a rea-

[1] 2 Stark. Ev., 282, 3d ed.
[2] Latham v. Rutley, 2 Barn. and Cress. R., 20.
[3] Tucker v. Cracklin, 2 Starkie C., 385.
[4] Mayhew v. Nelson, 6 Carr. and Payne R., 58.
[5] Griffiths v. Lee, 1 Carr. and Payne R., 110.
[6] Day et. al. v. Riddley et. al., 16 Verm. R., 48.

sonable time, the carrier is called upon to account for the goods, and render a legal excuse for the non-performance of his contract.[1] For, from the moment he receives the goods into his custody, every thing is negligence in the carrier which the law does not excuse.[2] And where he has not limited his liability by special contract, the law excuses him in only two instances; namely, where he is prevented from fulfilling his engagement by the act of God or of public enemies.[3]

In respect to goods delivered to one who is not a common carrier, for conveyance from one place to another without hire, the presumptions are different, and the bailee may excuse himself for a loss by evidence of his own acts and declarations immediately before and after the loss; that is to say, these are to be received in evidence as a part of the case, which the jury are at liberty to consider.[4] Such declarations, to become a part of the *res gestae*, must have been made at the time of the act done, which they are supposed to characterize; and have been well calculated to unfold the nature and quality of the facts they are intended to explain, and so to harmonize with them, as obviously to constitute one transaction.[5]

In an action against a bailee without hire, on an undertaking to carry and deliver a sealed letter containing money, the plaintiff must prove that the defendant has been guilty of gross negligence, or that he has broken the seal and appropriated the money to his own use. But it seems that the plaintiff may relieve himself from the burden of proof, by demanding the money of the bailee before suit brought, and that the bailee after a refusal will be answerable, unless he can show its loss without fault or negligence on his part.[6] The distinction would seem to be, that when there is a total

[1] Dale v. Hall, 1 Wils., 281.

[2] Rich v. Kneeland, Hob., 18; Batson v. Donovan, 4 Barn. and Ald., 21; 21 Wend. R., 190; 1 Conn. R., 487.

[3] Jermey on Car., 31, 32.

[4] Tompkins v. Saltmarsh, 14 Serg. and Rawle., 275.

[5] Enos v. Tuttle, 3 Conn. R., 250.

[6] Beardslee v. Richardson, 11 Wend. R., 25.

failure to deliver the goods bailed, on demand, the *onus* of accounting for the default lies with the bailee; otherwise he shall be deemed to have converted the goods to his own use;[1] but where he has shown a loss, or where the goods are injured, the law will not intend negligence. The *onus* is then shifted upon the plaintiff. In the case of a common carrier the rule is different. The law presumes against him in all cases, even of accident, until he shows the loss or injury to have arisen from the enemies of the state, or the act of God.[2]

In the case of a special acceptance by the carrier, on an agreement limiting his liability, as the plaintiff must set forth the contract according to its terms, he is, it seems, bound to show a loss or injury arising from causes or negligence, for which the defendant is answerable.[3] But if there be an entire failure to deliver the goods at the place of destination, evidence of such failure is enough, in the first instance, to put the carrier upon his defence; for it would be unreasonable in such a case, to require of the owner of the goods proof of facts and transactions peculiarly within the knowledge of the carrier.[4] If the plaintiff aver facts and circumstances, from which the law implies a contract, and then alleges that the defendant failed to deliver the property according to his undertaking, he must prove the non-delivery; and so, if he aver a loss or injury of the property through the defendant's negligence, in a particular manner, his proof must support his pleading.[5]

The plaintiff must prove, as well as allege, the facts which constitute his cause of action; but in the nature of things, he cannot prove a negative fact with the same certainty, or with the same species of evidence with which he establishes

[1] 2 Salk., 655; Foot v. Storrs, 2 Barb. R., 326.

[2] 1 Term R., 33; 7 Cowen R., 500, note A.

[3] Harris v. Packwood, 3 Taunt. R., 264; Marsh v. Horne, 5 Barn. and Cres. R., 322; but see King v. Shepherd, 3 Story R., 349, and Turney v. Wilson, 7 Yerg. R., 340; 5 Bing. R., 217, 226.

[4] Story on Bailm., § 529, 573.

[5] 2 Stark. Ev., 282.

an affirmative fact.[1] The rule is, that the party seeking to take advantage of an exception, must bring himself within the exception; the party bound by law to perform a certain duty, which he cannot omit without rendering himself guilty of culpable neglect, will be presumed to have discharged his duty.[2] That which is ordinary and common will be presumed to continue; thus a state of peace and the continuance of treaties will be presumed by all courts of justice, till the contrary be shown; and this is *presumptio juris et de jure*, until the national power of the country in which the court sits, officially declares the contrary.[3]

Prima facie, the delivery of a package to a common carrier, binds him to carry and deliver it safely to the consignee, and evidence of non-delivery is sufficient to charge him; but as soon as he shows a special acceptance, the burden of proof is changed.[4] For proof of the loss or non-delivery of an article, received with a knowledge of the usual five pound notice, is not evidence on which the plaintiff can recover.[5] Having stipulated that he will not be answerable for goods intrusted to him, beyond the value of five pounds, unless the same are entered and paid for according to their value, it is not incumbent on the carrier, where the goods are not so entered, to prove affirmatively that he has used reasonable care; the *onus* of proving negligence, in this case, is on the plaintiff.[6]

Where simple negligence is enough, under the terms of the contract to charge the carrier, proof of a loss, the cause of which is not shown, is sufficient.[7] But the rule is otherwise where he is only answerable for gross negligence. Under the English statute, already referred to, in an action of assumpsit against carriers for the loss of a parcel above the

[1] 11 Pick. R., 106; 6 Carr. and Payne R., 58; 1 id., 110.

[2] Hartwell v. Root, 19 John. R., 345; Munn v. Baker, 2 Stark. R., 255; 3 Wend. R., 227.

[3] The People v. McLeod, 1 Hill R., 470.

[4] Mayhew v. Eames, 3 Barn. and Cres. R., 601; Harris v. Packwood, 3 Taunt. R., 264.

[5] Riley v. Horne, 5 Bing. R., 217.

[6] Marsh v. Horne, 5 Barn. and Cres. R., 327.

[7] 5 Bing. R., 217.

value of ten pounds, the defendants cannot give in evidence, under the plea of non-assumpsit, the defence given them by the carriers' act, that the value of the article has not been declared at the time of the delivery.[1]

Carriers upon the high seas, though bound to answer for the goods intrusted to them for carriage, are by a recent statute exempted from losses arising from fire, or from robbery or embezzlement.[2] This act is similar in its terms to the statutes of 7 Geo. II., ch. 15; and 26 Geo. III., ch. 86; and 53 Geo. III., ch. 159, exempting the owners of vessels from responsibility as common carriers for losses by fire, and also from liability for gold, silver, diamonds, watches, jewels and precious stones, not inserted in the bill of lading; with this further provision, that the owners of a vessel shall not in any case be answerable beyond their respective shares in the ship and freight.[3] The act of congress, entitled "An act to limit the responsibility of ship-owners," has very materially lessened the liability of carriers on the sea; but it does not apply to the owners of canal boats, barges, or lighters, nor to vessels of any description used in river or inland navigation.

Damages.

The amount of damages to be recovered in an action against the carrier, depends upon the extent of his liability and the nature of the loss or injury sustained.[4] In the case of a total loss, where there is no special contract limiting his liability, the value of the goods at the place of destination, deducting freight, is the measure of damages; if the goods be not totally lost, the owner recovers damages proportionable to the injury sustained.[5] In an action on a bill of lading, for not delivering goods, stated to be embezzled

[1] Syms v. Chaplin, 1 Nevile and Perry's R., 129.

[2] See the statute of 1851 in the Appendix.

[3] Wilson v. Dickson, 2 Barn. and Ald., 2; 2 Kent's Comm., 606.

[4] Jeremy on Carriers, 132; Ludwig v. Meyre, 5 Watts and Serg., 435; Hand v. Baynes, 4 Whart. R., 204.

[5] Bracket v. M'Nair, 14 John. R., 170; Wallace v. Vigus, 4 Blackf. (Ind.) R., 260; McGregor v. Kilgore, 6 Ohio R., 143.

or lost during the voyage, without fraud on the part of the defendant, it was held that the master was bound to answer for the value of the goods missing, according to the clear net value of goods of like kind and quality, at the port of delivery; but whether he is also to pay interest from the time when the goods ought to have been delivered, or not, depends on the circumstances of the case; but if no fraud or misconduct is imputable to the master, interest will not be allowed.[1]

The general doctrine is, that the master must make good the loss or damage accruing to the goods which he undertook to carry safely, for hire; and the rule applies to all cases in which the master is responsible for the missing goods; and it is deemed salutary because in furtherance of the general policy of the marine law, which holds the master responsible as a common carrier, for accidents, and all causes of loss, not coming within the exception in the bill of lading; and because it takes away all temptation to withhold a delivery of the goods, and exempts the shipper from the hard task of undertaking to detect, in every case, the negligence, fault or fraud of the carrier; and it must be admitted that the rule would be highly just and necessary, if the loss was imputable to either of these causes.[2]

The damages recoverable against carriers for the negligent loss or injury of goods intrusted to them for transportation, are to be ascertained by resorting to the price which goods of the same kind and quality bore in market at the time the injury occurred; and this, though subsequent experiments in the use of such goods have resulted in showing that the market price was almost wholly imaginary, their real value being little or nothing.[3] Where the goods have been injured through the negligence of the carrier, the subsequent acceptance of them by the owner is no bar to an action, but

[1] Watkinson v. Laughton, 8 John. R., 213.

[2] Gillingham v. Dempsey, 12 Serg. and Rawle R., 188; Brandt v. Bowlby, 2 Barn. and Adolph. R., 932; Warden v. Greer, 6 Watt's R., 424; O'Conner v. Foster, 10 Watt's R., 418.

[3] Smith v. Griffiths, 3 Hill R., 333. The case of the mulberry trees.

may be given in evidence in mitigation of the damages.[1] And in estimating or measuring the damages for the injury, the rule is to ascertain the value of the goods as delivered to the carrier, and the value of them in their damaged condition, when received by the consignee; the difference between these amounts is the true measure of damages.[2]

Without doubt the owner of the goods is entitled to recover as damages a sum sufficient to make him whole, that is to say, sufficient to indemnify him for the loss sustained. If the goods are wholly lost, he recovers the full worth at the time of such loss or destruction; if injured, he recovers a sum, which, added to the value of the injured article, is equal to that article in a sound condition. In an action in the nature of trover, the measure of damages is the value of the goods at the time and place of conversion, with interest; or, perhaps, at any time between that and the trial.[3]

Exceptional Cases.

Since the introduction of railways, the transportation of horses, cattle and other live stock has grown up into an important branch of business. In England, whose railway companies are under no obligation to assume the character and liabilities of a common carrier, a custom has been introduced of receiving such articles of freight under a special contract, by the terms of which the owners or their servants accompany the trains, and take care of and feed the cattle during the journey. In some instances the charge for freight is made expressly for the use of the railway carriages and locomotive power only, with an express stipulation that the company will not be responsible for any alleged defects in the carriages used, unless complaint is made at the time of booking; nor for any damages, however caused, in the journey of transportation.[4]

[1] Bowman v. Teall, 23 Wend. R., 306, and cases there cited.

[2] McHenry v. Railroad Co., 4 Harring R., 448.

[3] Kennedy v. Strong, 14 John. R., 128; West v. Beach, 3 Cowen R., 82; 3 Hill R., 337.

[4] Shaw v. The York and North Midland R. Co., 6 Eng. Rail. Ca., 87; Austin v. The Manchester and Sheffield R. Co., 5 Eng. Law and Eq. R., 329.

Under such circumstances, the English railway companies are held liable under the terms of the agreement, for a breach of such duties as arise out of the contract, and as special bailees simply. They are regarded or treated as common carriers only so far as they voluntarily become such; and this they plainly refuse to do in their agreements and mode of transacting the business. Hence, where the contract is, that they shall not be held responsible for any damage, however caused, it is decided that they are not liable for damages occasioned even by gross negligence; there being no willful misconduct or misfeasance on their part.[1]

It is to be noticed that where the owner himself accompanies his cattle, having the care and custody of them, under an agreement which amounts substantially to a contract for the hire of the cars or carriages and locomotive power, there is not a complete delivery of the property into the possession of the railway company. The situation of the carrier is similar to that of one who undertakes the carriage of slaves; and who, because he has not, and cannot have the same absolute control over them as he has over inanimate matter, is not answerable for them as a common carrier. The slave having volition and the capacity of personal movement, like a passenger, cannot be delivered and stowed away as a bale of goods; and therefore it is adjudged that the common law responsibility of the carrier, as to goods, does not apply to the case of carrying human beings, such as negro slaves.[2]

There is another class of cases still more closely analogous, in their essential features, to these English railway cases. The owners of steamboats engaged in the business of towing barges and canal boats, though holding themselves out as ready to engage for all who may desire their services, are not regarded as common carriers. They do not

[1] Carr v. The Lancashire and Yorkshire R. Co., 14 Eng. Law and Eq. R., 340; Chippendale v. The Lancashire and Yorkshire R. Co., 7 Eng. Law and Eq. R., 399; Morrill v. The Great Northern R. Co., 10 Eng. Law and Eq. R., 366.

[2] Boyce v. Anderson, 2 Peters' R., 150; Stokes v. Saltonstall, 13 id., 181; Swigert v. Graham, 7 B. Munroe R., 661; Clark v. McDonald, 4 M'Cord R., 223; Williams v. Hitchcock, 4 Port R., 234.

receive the property into their custody, nor exercise any control over it other than such as results from the towing of the boats in which it is laden. The master and hands of the boats towed, retain the care and charge of the goods on board, subject only to the general authority of the master of the steamboat in guiding the flotilla. There is here no delivery sufficient to constitute a bailment, certainly none sufficient to charge the owners of the steamboat as common carriers.[1]

Not receiving the property as common carriers, the parties to the contract are at liberty to make just such stipulations as they please, concerning the risk to be incurred. They may become insurers against all possible hazards, or they may say, we will answer for nothing but a loss happening through our own fraud or want of good faith. In short, the parties stand on equal terms, and can in this matter, as they may in others, make just such a bargain, as they think will answer their purpose.[2]

In the English cases, referred to, the railway companies who have not become common carriers are treated as special or qualified bailees, who are at liberty to exempt themselves from all liability except such willful misfeasance or gross negligence as would amount to a renunciation of the bailment. But where they have made themselves common carriers, the effect of a special contract is to exclude certain losses, leaving the carrier liable as upon the general custom for all others.[3] The restriction in the contract that he will not be answerable for the goods, is regarded as an exception, leaving the carrier bound to use ordinary care in the custody of the goods and in their conveyance to, and delivery at their place of destination, and in providing proper vehicles for their carriage.[4] In other words, though he stipulates in general terms that he will not be responsible for goods unless entered and paid for according to their value, he is still

[1] Alexander v. Greene, 3 Hill R., 9; 7 id., 533; Wells v. The Steam Navigation Co., 2 Comst. R., 204; Caton v. Rumney, 13 Wend. R., 387.

[2] 2 Comst. R., 209.

[3] Wyld v. Pickford, 8 Mees. and Welsb., 443, 372.

[4] 8 Mees. and Welsb., 443; 4 id., 749; 12 id., 766.

bound to exercise ordinary care, and is responsible for losses occasioned by his default or neglect of duty.[1] It seems, the common carrier cannot in any case stipulate for the privilege of being negligent, though other bailees may by an express contract vary the liability imposed upon them by law, so as to reduce it below the standard of ordinary care.[2]

The introduction of railroads into this country has been followed by their construction over the great lines of travel and transportation; and the proprietors of these novel and important modes of travel and transportation, which has received so much public favor, have become the carriers of great amounts of merchandise. They advertise for freight; they make known the terms of the carriage; they provide suitable vehicles, and select convenient places for receiving and delivering goods; and, as a legal consequence of such acts, they have become common carriers of merchandise, and are subject to the provisions of the common law applicable to carriers.[3]

In this state railroad corporations are, by an act of the legislature, made common carriers, with such variations as the nature of the business requires; they are required to furnish sufficient accommodation for the transportation of such property and passengers as are offered for carriage; to take them up and discharge them at the usual and fixed time and places of receiving and discharging passengers and freight; to make known the times when they start and run their cars by a previous public notice, and to answer in an action for damages to the party aggrieved, for any neglect or refusal in the premises. They are required to forward the goods delivered to them within a reasonable time; what is a reasonable time, must depend upon the actual circumstances existing at the time the property is offered for transportation. There being no cause for delay, the property must be sent forward immediately. They are to carry all

[1] 8 Mees. and Welsb., 443; see also Dorr v. N. J. Steam Nav. Co., 4 Sand. R., 136, and S. C., 1 Kernan R., 485.

[2] Sager v. The Portsmouth S. & P. & E. Railroad Co., 31 Maine R., 228.

[3] 10 Metcalf R., 472, per Hubbard, Justice; 19 Wend R., 534; 13 Wend. R., 60.

kinds of property, but there is nothing to prevent them from making a special contract for the carriage; nor are they required to send forward the goods by the very next train after they are received, when that is rendered impracticable by an unusual accumulation of business at the point where they are received.[1]

Being common carriers, railroads have no right to prescribe the conditions on which alone they will receive goods for transportation; but where they actually receive them under a special agreement for carriage, their liabilities, with a few exceptions, will be regulated by the terms used.

It is understood, however, that in respect to live stock a custom is growing up similar to that which prevails in England, under which, as we have seen, there is but a partial and qualified delivery to the carrier. But where cattle or horses are delivered into the custody of the officers or servants of railroad companies, who have become common carriers of such property, they are answerable for them as carriers, though they are at liberty to restrict their liability by a special agreement.[2] They are bound to provide suitable carriages and conveyances, to guard against improper hazards and injury to the property by storms, to obey special directions given them as to the manner of transporting the property intrusted to them, and to answer for any damages resulting to the property by their neglect or misconduct, notwithstanding a special agreement exonerating them from all damages that may happen. Though such an agreement is a valid excuse for such losses as are incurred by the running off of the cars from the track, breaking the legs of live stock, and the like accidents, it does not excuse them for their own malfeasance, misfeasance or negligence.[3]

The contract operates to change the burden of proof, so as to require the owner to prove that the loss was occasioned by the misconduct or neglect of the company; but the bur-

[1] See act of 1850, and 2 Kernan R., 245.

[2] 31 Maine R., 228; 13 Wend. R., 611; 19 id., 534; Logan v. Ponchartrain Railroad Co., 11 Rob. (Louis) R., 24; 10 N. Hamp. R., 481.

[3] 31 Maine R., 228.

den of proof is again changed as soon as it is shown that the company has disobeyed the instructions of the owner in respect to the manner of transporting the property.[1] And it is enough that such instructions are given to the agent of the company, acting for them and receiving the property.[2]

CARRIERS OF PASSENGERS.

A common carrier of passengers is one who holds himself out to the public as ready to receive and carry on his route for hire all persons who apply for a passage. He assumes the character by entering upon the business, and representing himself to the community as undertaking to convey, indifferently, all such as may desire to be received as passengers.[3] His duties resemble those of the common carrier of goods; like him, he has entered into an engagement with the public, and is bound to serve all who require his services.[4] He has a right to demand prepayment of his hire, but is not at liberty to choose between those whom he will and will not receive; neither can he, under pretence of demanding exorbitant fare, escape from his obligation to carry any and every individual who pays or tenders to him the usual rate of fare.[5]

The owners of stage coaches and steamboats, and railroad companies, who hold themselves out as common carriers of passengers, are bound to receive all who require a passage, so long as they have room, and there is no legal excuse for a refusal.[6] As to what will be regarded as a legal excuse, Mr. Justice Story, in Jencks v. Coleman, remarks:[7] "There is no doubt that this steamboat is a common carrier of pas-

[1] 1 Bing. R., 34; 11 Pick. R., 41; 2 Seam. R., 285.

[2] Fulton Bank v. New-York Canal Co., 4 Paige, 127; 31 Maine R., 228.

[3] Middleton v. Fowle, 1 Salk., 182, 249.

[4] Messiter v. Cooper, 4 Esp. R., 260.

[5] Beekman v. Schenectady and Saratoga Railroad Co., 3 Paige Ch. R., 45.

[6] Bennett v. Dutton, 10 N. Hamp. R., 481; New-York Session Laws of 1850, p. 231, 232.

[7] Jencks v. Coleman, 2 Sumn. R., 221; Markham v. Brown, 8 N. Hamp. R., 523.

sengers for hire; and, therefore, the defendant, as commander, was bound to take the plaintiff as a passenger on board, if he had suitable accommodations, and there was no reasonable objection to the character or conduct of the plaintiff. The question then really resolves itself into the mere consideration whether there was, in the present case, upon the facts, a reasonable ground for the refusal. The right of passengers to a passage on board of a steamboat is not an unlimited right. But it is subject to such regulations as the proprietors may prescribe, for the due accommodation of passengers, and for the due arrangement of their business. The proprietors have not only this right, but the further right to consult and provide for their own interests in the management of such boats, as a common incident to their right of property. They are not bound to admit passengers on board, who refuse to obey the reasonable regulations of the boat, or who are guilty of gross and vulgar habits of conduct; or who make disturbances on board; or whose characters are doubtful or dissolute or suspicious; and *à fortiori*, whose characters are unequivocally bad. Nor are they bound to admit passengers on board, whose object is to interfere with the interest or patronage of the proprietors, so as to make the business less lucrative to them."

It is not a legal excuse for refusing to receive a passenger, that the owners of a line of stages run their coach in connection with another coach which extends the line to a certain place, and have agreed with the proprietors of such other coach not to receive passengers who come from that place, on certain days, unless they come in his conveyance. If the passenger is a fit person to be admitted, and there is no evidence of a design on his part of injuring the carrier's business, he is bound to receive him, notwithstanding his agreement.[1]

The duty of the carrier of passengers, to receive such as apply for a passage, is qualified and limited by the right which he has to prescribe reasonable regulations for the order and convenience of passengers; in respect to the man-

[1] 10 N. Hamp. R., 481.

ner of giving and collecting tickets; for the protection of passengers from the annoyance of a clamorous solicitation by runners and agents of other carriers, hotels or inns; and for the prevention of all disorderly conduct in and about the places of arrival and departure.[1] He is not bound to receive a drunken man into his conveyance, nor any person who disturbs the peace of the company. He has a right, for his own defence, to inquire into the business and purposes of a passenger, in order to avoid giving aid to the agent of a rival line, but not on any other ground.[2]

The innkeeper, whose right and duty in this particular are the same, is bound to receive as a guest every person who behaves himself properly and is ready to pay for his accommodations; and has no right to demand the name, or to inquire into the business of a traveler who stops at his house.[3] The passenger has a right to the presumption that he is engaged in his lawful calling, and cannot be subjected to an inquisition into his private affairs, by a general and public agent. Before he can be rejected and excluded as a passenger, from a public conveyance, there must appear against him some valid and good reason for his exclusion; a reason which the law recognizes as sufficient to deprive him of the right which he holds in common with all other men.[4] It must be shown that he has forfeited his right.

The depot of a railroad company is to some extent a public place, from which the superintendent of the road has no right capriciously to exclude a person, under the pretense that he has conducted himself offensively towards him. A violation of the reasonable regulations of the company will justify his exclusion from the premises; what are to be deemed reasonable rules must depend upon the circumstances of the case and the object for which they are framed. In order to secure the quiet and safety of travelers, the proprietors of steamboats, railroads and hotels, are invested

[1] Commonwealth v. Power, 7 Met. R., 596; Hale v. Power, 12 Met. R., 482; Markham v. Brown, 8 N. Hamp. R., 523.

[2] 2 Sumn. R., 221.

[3] Rex v. Ivers, 7 Carr. and Payne R., 213; 6 id., 742.

[4] 10 N. Hamp. R., 481.

with the right of preserving peace and order, in the grounds and conveyances used by them in the transaction of their business. And this right may be enforced in a manner established by rules, or without them, by the exercise of a reasonable and proper authority reposed in them by law.[1]

Payment of fare.

The carrier of passengers, like a common carrier of goods, has a right to demand payment of his hire in advance, as a condition precedent to receiving any person as a passenger. Passage money or fare, and freight are governed by the same rules.[2] Where one takes his place in a stage-coach, and pays at the time only a part of the fare as a deposit, the proprietor is at liberty to fill up his place with another passenger, if the first is not at the inn ready when the coach sets off.[3] But if at the time of taking his place he pays the whole fare, the proprietor cannot dispose of his seat to another, for the passenger may take it at any stage of the journey he thinks proper, and which may be most convenient to him. Having permitted a passenger to get into the stage at its usual hour of departure, and have his luggage fastened on, the owner cannot afterwards refuse to go the journey, if the hire be tendered to him; for this is such an inception of the contract that he is bound to go through with it.[4]

The passenger's fare, in contemplation of law, covers and includes a compensation for the conveyance of his baggage;[5] under which term is included the ordinary wearing apparel customarily carried by travelers.[6] It does not include merchandise, nor a larger sum of money than is necessary for his journey; but it may include articles of ornament and use, such as a watch, and articles of amusement, such as a gun

[1] Markham v. Brown, 8 N. Hamp. R., 523; 12 Met. R., 482; 7 Met. R., 596; 2 Sumn. R., 221.

[2] Moffatt v. East India Co., 10 East R., 468; Watson v. Duykinck, 3 John. R., 335; Griggs v. Austin, 3 Pick. R., 20; 1 Peters' (Adm.) R., 126, 206.

[3] Ker v. Mountain, 1 Esp. R., 27.

[4] 4 Esp. R., 260; Jeremy on Car., 23.

[5] 9 Wend. R., 85.

[6] 25 Wend. R., 159.

or fishing tackle.[1] Formerly a distinct price was paid by the traveler for the carriage of his luggage, and the carrier was held liable for it only in respect to the reward received by him; but now by custom or the courtesy of the carrier, payment of the usual fare entitles the passenger to carry with him usual and ordinary baggage.[2] But it has been doubted whether money can be included under the term, or comes fairly within the scope of the privilege. It has, however, been held, in England and in this country, to cover articles of jewelry.[3]

Under the statute of this state, prescribing the mode in which railroad corporations shall transact their business, a check must be affixed to each parcel of baggage delivered for transportation, and a duplicate thereof given to the owner or person delivering it; and a penalty is imposed upon the corporation for every refusal. If upon producing this check, the baggage be not redelivered at the proper place, the passenger may be himself a witness in a suit brought in his own name, to prove the contents and value of the baggage.[4]

By the same act, when a passenger refuses to pay his fare, it is lawful for the conductor of the train and the servants of the corporation to put him and his baggage out of the cars, using no unnecessary force, at any usual stopping place, or near any dwelling-house, as the conductor may elect, on stopping the train.[5] A custom has recently grown up of delivering a ticket to passengers on the payment of their fare, to be surrendered on the route, when called for. This ticket is a species of special contract, usually surrendered near the end of the route; and it is sometimes given "for this day only." When so limited by express terms, it is not good on any other day; and where the ticket offered is for that reason rejected as valueless, and the passenger refuses to pay his fair, the railroad corporation has the right

[1] Hawkins v. Hoffman, 6 Hill R., 586; 6 Ohio R., 358; 3 Barr. R., 451.
[2] 9 Wend. R., 117; 6 Hill, 586.
[3] McGill v. Rowland, 3 Barr. R., 451.
[4] Statutes of 1850, p. 232.
[5] Same statute, p. 231.

to stop the train and put him off. But in doing so, it must take care to use no unnecessary force; and in this state the implication of the statute is that it can be done only at one of the usual stopping places or near some dwelling-house, to the end that the passenger may not be unnecessarily exposed to injury and loss of health.[1]

If the carrier of passengers be not paid his hire in advance he has a lien for the same upon the baggage intrusted to him; and may detain it as a security for its payment; but he cannot detain the passenger himself.[2] When he waives his right to payment in advance, he is presumed to rely upon the lien given him by law on the baggage of his passenger, or upon his personal responsibility, as security for his hire or reward.[3]

The carrier's lien does not involve or carry with it a power to sell and satisfy his demand; it is a naked right of detention which cannot be made available to liquidate his charge, without a legal proceeding, in the nature of a foreclosure in equity.[4] It seems that the carrier, like the innkeeper, may have a lien upon the goods intrusted to him by the bailor, though they be not in fact his property, provided he receives them in good faith.[5] As he cannot refuse to accept the goods, nor on his own behalf dispute the title of the bailor after he has accepted them, it seems reasonable that he should be protected in his rights, and entitled to receive a fair compensation for services which the law compels him to perform.[6]

A distinction has been attempted between the carrier and the innkeeper, in such cases; the keeping, it is said, furnished to cattle intrusted to the innkeeper, is a benefit to the owner, because it is for the nourishment and preservation of his property; whilst the transportation of his goods from one place to another, by the carrier, may be a detriment

[1] 7 Met. R., 596; 11 Met. R., 121; Angel on Car., p. 503, 601.
[2] Wolf v. Summers, 2 Campb. R., 631.
[3] Sunbolf v. Alford, 3 Mees. and Welsb. R., 148.
[4] Ante, pages 308, 411, 414.
[5] Grinnell v. Cook, 3 Hill R., 490; York v. Grenaugh, 2 Ld. Raym., 867.
[6] Johnson v. Hill, 3 Stark. R., 172.

instead of a benefit. This distinction has been recognized as sound in several recent cases, but it cannot be consistently placed upon the ground of a greater or less benefit received; for that would be to make it a question of fact instead of principle.[1] It is argued that the principle *caveat emptor* applies, so that the carrier is bound to take care that the person from whom he receives goods has authority to place them in his custody, and that he may protect himself from the consequences of such a failure of title, by demanding his hire in advance.[2]

But here, again, he stands in precisely the same relation as that sustained by the innkeeper, for he also may demand payment in advance; and both have about the same opportunity, which is none at all, to investigate the title.[3] As to the innkeeper, it is conceded that he is bound to receive the guest, and cannot stop to inquire whether he is the right owner of the property he brings; and that where he receives it in good faith, he may retain it under his lien, even as against the real owner.[4] If the common carrier has received the goods in good faith, upon the prima facie evidence that the possession accompanies the title, and bestowed his services upon them in their carriage, under the implied compulsion of his legal duty, there is no apparent ground of distinction between his case and that of the innkeeper.

General liability.

The minor duties of the carrier of passengers grow out of, and are deducible from that general responsibility which binds him to carry safely those whom he takes into his conveyance, as far as human foresight and care will go; that is, for the utmost care and diligence of very cautious persons.[5]

[1] Fisk v. Newberry, 1 Doug. (Mich.) R., 1; Buskirk v. Purington, 2 Hall (N.Y.) R., 561, and Collman v. Collins, id., 569.

[2] 1 Doug. R., 1.

[3] King v. Richards, 6 Whart. R., 418.

[4] Turrill v. Crawly, 13 Jur., 878; Robinson v. Walter, Paph. Rep., 127; 3 Hill R., 486.

[5] Christie v. Griggs, 2 Campb. R., 79; Camden and Amboy Railroad Co. v. Burke, 13 Wend. R., 611; Story on Bailm., § 601; Stokes v. Saltonstall, 13 Peters R., 181; Aston v. Heaven, 2 Esp. R., 533; 2 Kent's Comm., 600, 601.

This rule is less stringent than that which applies to common carriers of goods, who are, in the nature of insurers, answerable for accidents and thefts, and even for losses by robbery; for all losses, in short, which do not fall within the excepted cases of the act of God, or of the public enemy. Passenger carriers do not warrant or insure the safety of passengers; they are not responsible for accidents, but only for want of due care, for the want of the utmost human foresight and that degree of diligence which characterizes very cautious persons.[1]

The adjudged cases are but an amplification and illustration of this rule, which is very frequently, if not generally stated in negative terms. "There is," says Sir James Mansfield, "a difference between a contract to carry goods and a contract to carry passengers. For the goods the carrier is answerable at all events, but he does not warrant the safety of passengers; his undertaking, as to them, goes no further than this; that as far as human care and foresight can go, he will provide for their safe conveyance."[2]

The same care and diligence which will excuse carriers in case of accident to passengers, will not excuse them for damage to, or loss of goods. In the case of passengers, the carriers are responsible only for negligence; but in respect to their baggage, they are responsible as common carriers, and accident is no excuse. The reason for the distinction is not very apparent in the present state of society; but the difference seems to be settled upon authority.[3]

The rule of responsibility is stated by the supreme court of the United States in these terms:[4] "It is certainly a sound principle that a contract to carry passengers differs from a contract to carry goods. For the goods, the carrier is answerable at all events, except the act of God and the public enemy. But although he does not warrant the safety of the passengers, at all events, yet his undertaking and

[1] Sharp v. Grey, 9 Bing. R., 457; 13 Wend. R., 627.
[2] 2 Campb. R., 79.
[3] 13 Wend. R., 628, per Ch. J. Savage.
[4] Stokes v. Saltonstall, 13 Peter's R., 191.

liability go to this extent, that he or his agent, if, as in this case, he acts by agent, shall possess competent skill; and that as far as human care and foresight will go, he will transport them safely. The principle is in substance thus laid down in the case of Christie v. Griggs."[1]

The carrier of passengers is liable only for negligence;[2] but the law adjudges that to be negligence in him which evinces a want of that degree of circumspection and foresight which very cautious persons exercise where the lives, limbs and health of human beings are concerned. He is required to exercise extraordinary care, and is liable even for slight neglect.[3]

The strictness of this rule requires of the proprietors of stages the utmost caution in respect to the manner and means by which their business is carried on. The coachman must have competent skill, and must use that skill with diligence; he must be well acquainted with the road he undertakes to drive; he must be provided with steady horses, with a coach and harness of sufficient strength, and properly made, and also with lights by night. If there be the least failure in any one of these things, the duty of the coach proprietors is not fulfilled, and they are answerable for any injury or damage that happens. But with all these things, and where every thing has been done that human prudence can suggest for the security of the passengers, an accident may happen. The lights may in a dark night be obscured by fog; the horses may be frightened, or the coachman may be deceived by a sudden alteration in objects near the road, by which he had used to be directed on former journeys.[4]

By the rules of the common law every principal is liable for the acts or omissions of his agent, and every master for those of his servant within the scope of the employment for which the agent or servant is retained. These rules apply emphatically to carriers engaged in the business of trans-

[1] 2 Campbell R., 79.
[2] Crafts v. Waterhouse, 3 Bing R., 321.
[3] Ingalls v. Bills, 9 Met. (Mass.) R., 1.
[4] 3 Bing R., 321, per Ch. J. Best.

porting passengers for hire. Though, as a general rule, the person who contracts to perform a particular service for a reward is responsible only for ordinary care and diligence, the law exacts from passenger-carriers and their servants extraordinary care and diligence; and hence, unless the loss with which they are sought to be charged, appears to have resulted from irresistible force or inevitable accident, they are not excused from liability. These rules have been often assailed as harsh and inequitable, but they are found in the code of nearly every civilized nation, ancient and modern, and are in reality founded on very manifest and sound reasons of public policy. If an injury results from the overturning of a stage, the true inquiry is whether the injury has been caused by the want of the utmost care and diligence in the carrier and his servants. Evidence which shows the want of such care and diligence is[4] sufficient to establish his liability; but he is not liable for injuries arising from force or pure accident.[1]

Coaches must be road-worthy.

[2] The carrier of passengers is not only bound to provide safe vehicles for the carriage of passengers, but in the case of an injury, it lays with him to show that his coach was as sound and good as could be made; and that it was free from defects of every kind; for the proprietor of the coach is liable for all defects in his vehicle which can be seen at the time of construction, as well as for such as may exist afterwards and be discovered on investigation. Thus, he is answerable where the injury appears to have been occasioned by an original defect of construction, which cannot be seen without taking off the iron from the wood work of the axletree.[3] He is liable also for an injury resulting from the malconstruction of the coach, connected with the improper lading of the baggage.[4]

[1] Caldwell v. Murphy, 1 Duer R., 233.
[2] 2 Campb., 80.
[3] Sharp v. Grey, 9 Bing R., 457.
[4] Curtis v. Drinkwater, 2 Barn. and Ald. R., 169.

There is an implied warranty or agreement on the part of the passenger carrier, that the coaches or other vehicles used by him in the conveyance of passengers, are safe and sufficient for the journey or business in which they are employed.[1] As his vessel must be sea-worthy, his carriage must be land-worthy; and to insure this, he is bound to have it thoroughly examined previous to the commencement of each journey.[2] Though it be sound, he is answerable for any neglect or omission in preparing it for the road, such as failing properly to secure or fasten on the wheels.[3] If the harness or gearing fails, or if the coach is broken down or overturned, negligence in some proper precaution is always implied on the part of the owner, on whom it lies to rebut the presumption.[4] In order to excuse him, the accident must appear to be such as could not be anticipated or provided against by human skill and foresight.

Railroad companies are under the same obligation to provide safe and secure cars, with engines and machinery in perfect order.[5] The want of good engines, with suitable equipments, or proper vehicles for the business they carry on, is negligence on the part of the carriers.[6] Being carriers of passengers, they are subject to the duties, and entitled to the privileges and powers incident to such employment. They are, by the decisions, placed on the footing of the owners of steamboats. Both are modern modes of conveyance, but the rules of the common law are applicable to them, since they take the place of other modes of carrying passengers.[7]

There is no distinction between the proprietors of a line of coaches and the proprietors of a railway and the carriages used upon it in the transportation of passengers, in respect

[1] Bremner v. Williams, 1 Carr. and Payne R., 414; 13 Wend. R., 611.

[2] 9 Met. R., 1.

[3] Ware v. Gay, 11 Pick. R., 106.

[4] 2 Campb. R., 79.

[5] Carpue v. London and Brighton Railway Co., 5 Adolph. and Ellis (N. S.) R., 747.

[6] Palmer v. Grand Junction Railway Co., 4 Mees. and Welsb. R., 749; Bridge v. the same, 3 id., 244.

[7] 2 Sumner R., 221; 13 Wend. R., 611; 25 Wend. R., 459; 8 Mees. and Welsb., 372.

to the care and diligence required of them; but the railroad company is bound also to employ its care and diligence in keeping its road in a good and safe condition for the conveyance of passengers. In one case, the declaration against a railway company charged that they were the owners of the railway, and of the carriages used by them for the conveyance of passengers along it for reward; that they, being the owners of the railway and carriages, plaintiff, at their request, became a passenger in one of the carriages, for a certain reward paid to them, and they received him as such passenger, and it became their duty to use due care and skill in conveying him safely and securely from London to Brighton, alleging as a breach of duty, that they did not use due care and skill in conveying him, but took so little care, and so negligently and unskillfully conducted themselves in carrying him, and managing the carriage in which he was passenger, the train to which it was attached, and the engines whereby it was drawn, that the carriage was thrown off from the rails and the plaintiff severely injured.[1] There was evidence that the train was driven with very great speed, and thrown off the track; and Lord Denman, before whom the cause was tried, told the jury that they must be satisfied that the accident had been brought about by the negligence of the defendants in the course of carrying the plaintiff upon the railway; and that it having been shown that the exclusive management, both of the machinery and the railway, was in the hands of the defendants, it was presumable that the accident arose from their want of care, unless they gave some explanation of the cause by which it was produced; which explanation the plaintiff, not having the same means of knowledge, could not be expected to give.

So, where a collision of two trains happens, producing an injury to a passenger, there is a very strong presumption that the company has been guilty of a want of due care, either in the construction of their road, or in the running and management of their engines and trains upon it. Such an

[1] Carpue v. The London and Brighton Railway Co., 5 Adolph. and Ellis (New Rep.), 749; 1 Carr. and Payne R., 414.

accident can scarcely happen in spite of human foresight and the exercise of the utmost care in the conduct of the trains.[1] By a proper arrangement of the time of arrival and departure from each station, and the employment of an efficient corps of flagmen, such collisions may be prevented; and where steam is used as a motive power, though the principle of responsibility is not changed, it becomes applicable to a greater variety of objects, circumstances and conditions. It requires that the road shall be kept in good repair and running order, that the engines and machinery shall be sound and well constructed, that the cars or carriages shall be sufficient for the trip, and that nothing shall be left undone which may contribute to the safe conveyance of passengers.[2]

The mere fact that a passenger has sustained an injury while being carried as such, does not raise a presumption of negligence against the carrier. But it generally happens, in cases of this nature, that the same evidence which proves the injury done, proves also the defendant's negligence; or shows circumstances from which strong presumptions of negligence arise, and which cast on the defendant the burthen of disproving it. Thus, a presumption of negligence arises from the fact that an injury has been caused by a collision with another train run by the same carrier; or by a collision with another car standing on an adjoining track. For example: plaintiff's arm was placed in the open window of a car, and seriously injured by something which struck the elbow a violent and severe blow, marring the outside of the car, so as to leave a horizontal mark upon it, as the train was passing some cars standing on an adjacent track; and it was adjudged that the burthen of showing that the injury was accidental and without fault of the carrier was, under the circumstances, cast upon the defendant.[3] The jury

[1] 3 Mees. and Welsb. R., 244.

[2] Jeremy on Carr., 26, 27. Negligence is a matter of fact, to be found by the jury; but as it is the carrier's duty to guard against all dangers, the occurrence of an accident, producing an injury, is generally presumptive evidence of negligence or want of skill.

[3] Holbrook v. The Utica and Schenectady Railroad Co., 2 Kernan R., 236.

are to find from positive evidence that the injury complained of was caused solely by the negligence and want of care of the defendant, his agents or servants, and that no fault of the plaintiff contributed to produce the injury.

By the statute of this state, if any passenger on any railroad shall be injured while on the platform of a car, or on any baggage, wood or freight car, in violation of the printed regulations of the company, posted up at the time in a conspicuous place inside of its passenger cars then in the train, such company shall not be liable for the injury; provided at the time they have furnished room inside its passenger cars sufficient for the proper accommodation of the passengers.[1] A violation of this provision of the statute, would be such a culpable negligence as, in a case of injury resulting from his being there, would defeat an action for damages. But this would not be so where the injury was caused by a collision, occasioned by the carrier's gross negligence, and in no way attributable to the circumstance of the passenger's being out of his place on the train. This is distinctly adjudged in a case where the injury was sustained by a passenger in the baggage car, in consequence of a collision of two trains running in opposite directions through gross carelessness; the passenger being lawfully in the baggage car, that is, with the assent of the conductor. In this case the passenger's imprudence does not contribute to the accident or to the injury, either directly or remotely; and as he does not act unlawfully in going into the baggage car with the conductor's assent, he has a right to recover damages against the railroad company sustained by him in consequence of their neglect of duty; and it is their duty to employ the most scrupulous care and attention to prevent a collision of their trains running in opposite directions. They are bound to run their trains in such a manner that a collision may not occur.[2]

A railroad company which continues to use a defective and dangerous locomotive engine, after notice of its danger-

[1] Statute of 1850, see Session Laws of that year, p. 234.

[2] Carroll v. The New-York and New Haven Railroad Co., 1 Duer R., 571, and cases there cited.

ous condition, is liable even to one of its servants engaged in running such engine for an injury sustained by him, without negligence on his part, in consequence of such defects. For example, the plaintiff was injured by the explosion of the boiler of a locomotive engine on which he was employed by the defendants as a fireman. The boiler was defective and dangerous, and its condition in this respect was and had been for some time known to the defendants by the reports of the engineer made on five or six different occasions, which were entered on the books of the defendants kept for that purpose, and the injury of the plaintiff resulted from the improper conduct of the defendants in using the engine in question thus known to be defective. On this state of facts the defendants were adjudged liable.[1]

Where a passenger is injured, the actual fault of an agent is imputed to the principal on grounds of public policy; it is otherwise where a servant is injured through the fault of another and fellow servant. But this rule is changed where the injury to the servant is directly traceable to the negligence and misconduct of the principal.

Competent skill.

The passenger carrier impliedly undertakes that his agents and servants shall possess and exercise competent skill in the discharge of their several duties, incident to the employment of carrying passengers. The coachman must be a skillful and careful driver, acquainted with the road; the engineer must be qualified for his duties, by adequate knowledge, experience and capacity, and he must be diligent in the discharge of them; and the conductor of a train of cars, or the steersman of a boat, must be a capable and vigilant agent in the government and conduct of the conveyance committed to his charge.[2]

The responsibility of the carrier for the safe conveyance of passengers is the same, whether the work is done by him personally or by his servants and agents. The strictness of

[1] 1 Selden, 492; 4 Selden R., 175.

[2] 3 Bing. R., 314, 321; 13 Peters' R, 191; 2 Campb. R., 79; 13 Conn. R., 319; 1 Car. and Payne R., 636.

his duty is the measure of the diligence and circumspection and foresight demanded of those who are engaged in his employment. The act or neglect of the servant is that of the principal, who engages to assume and answer for it as his own; and it is immaterial whether the agent be in fact incompetent, or being competent proves himself negligent in performing the duties of his place. If he be an intemperate man or otherwise untrustworthy, his employer is answerable for any injury that may result from his misconduct; for it is a great neglect of duty in the carrier of passengers to intrust to such a person any responsibility for human life.[1] When a danger arises, the carrier is responsible that his servant shall use a sound and judicious discretion in avoiding or escaping from it.[2] If the driver of a carriage upon a public road has the opportunity to adopt either of two courses, one of which is safe and the other hazardous, and he elects the latter, he is responsible for the mischief which ensues; and it will not avail him in such case to say that he kept his own side of the road.[3]

It would follow from the general principle already stated, if it had not been distinctly adjudged, that the carrier of passengers is answerable for any injury resulting from rash and furious driving, racing, or other reckless conduct in the conveyance of passengers.[4] Merely fast driving is not of itself evidence of misconduct; but the least degree of imprudence or want of care in the driver renders his employers liable; and where a collision or other accident occurs while the driver is engaged in a race or trial of speed, it has been ruled that the carrier is responsible in exemplary damages.[5]

Evidently the same rules apply to the agents and conductors of a train of railroad cars; the company being answerable for the same diligence and foresight, are respon-

[1] 13 Peters' R., 181; Wynn v. Allard, 5 Watts' and Serg. R., 544; McKinney v. Niel, 1 McLean R., 540; 1 R. S., 873, 874, 3d ed.

[2] Dudley v. Smith. 1 Campb. R., 167; 2 Esp. R., 533; 8 Car. and Payne R., 691.

[3] Mahew v. Boyce, 1 Stark R., 343; Jackson v. Tollett, 2 id., 37.

[4] Gough v. Bryan, 5 Dowl. P. C., 765; Mayor v. Humphries, 1 Car. and Payne R., 251.

[5] Angel on Car., § 545, Peck and Wife v. Neil, 3 McLean (Cir. Co.), R., 22.

sible for the same kind of neglect or misconduct, and for all the consequences resulting from their default in duty, though not produced directly by their act.[1] In an action against a railroad company, for injuries sustained in jumping from a car while moving rapidly, it is sufficient to aver that by and through the negligence, unskillfulness and default of the company's servants in conducting and managing the car, and for the want of due care and attention to their duty, it became and was unfit for the plaintiff to remain in the car, and his life and limbs were then and there greatly jeoparded and endangered; and in order to get out of such danger and to preserve his life and limbs, he was obliged to jump from the car, whereby he was greatly hurt and injured. It is not necessary in the complaint to allege specifically the circumstances which rendered it unsafe and dangerous to remain in the car, or by what means and how his life and limbs were endangered; these particulars are more properly evidence in support of the averment of negligence, unskillfulness and want of due care on the part of the company.[2]

Where two persons are jointly interested in the profits of a common stage-wagon, but by a private agreement between themselves each undertakes the conducting and management of the wagon, with his own driver and horses, for specified distances, they are, notwithstanding this private agreement, jointly responsible to third persons for the negligence of their drivers throughout the whole distance; and an averment that the negligence was occasioned by the driver of one of them, against whom alone the action is brought, is supported by proof that the driver was actually employed by the other conducting the wagon, for his own stages.[3] So, where A, B and C run a line of stage-coaches from Utica to Rochester, and the route was divided between them into sections, the occupant of each section furnishing his own carriages and horses, hiring drivers and paying the expenses of his own section; and the money received as the fare of

[1] Eldridge v. The Long Island R. R. Co., 1 Sand. R., 89.

[2] 1 Sand. R., 89.

[3] Waland v. Elkins, 1 Stark. R., 217, action of case.

passengers, deducting therefrom only the tolls paid at turnpike gates, was divided among the parties in proportion to the number of miles of the route run by each; and an injury happened to a third person through the negligence of the driver of the coach of A; it was held that a joint action on the case at the suit of the party injured lay against B and C as well as A.[1] The parties being partners in the business, the servant of one of them is the servant of the others; for such a community of interest, with an agreement to share in the profit and loss of the business, constitutes a partnership.[2] "Each sharing in the profit of the whole route, and of course of each section of it, it is not only just, but in accordance with well settled principles of law, to hold all responsible for the faithful discharge of their duty; and to respond in damages for any injury which happens from the negligence or unskillfulness of any of the proprietors or their servants. It is just to the public and to themselves. The former have a right to claim the responsibility of all who profit directly by their patronage; and as to the latter, the loss should be borne by all. The drivers themselves are generally irresponsible men, and so frequently are single proprietors. The public safety and convenience will depend essentially upon the application of the rule of joint responsibility of all the proprietors, who will then see to it that all their copartners, and all who are employed in the concern, are trustworthy."[3]

Law of the road.

It is the duty of the carrier of passengers, as well as of all other travelers upon the highways, to observe the established usage or law of the road in passing other teams and vehicles. In England the custom is to keep to the left in passing; in this country the rule is reversed, each party keeping to the right.[4] But the rule is not so invariable as

[1] Bostwick v. Champion, 11 Wend. R., 571; Fromont v. Coupland, 9 Com. L. R., 300; Laugher v. Pointer, 12 id., 321.

[2] 16 John. R., 40; 9 John. R., 495; 1 Wend. R., 463; 18 Wend.. R, 175.

[3] 11 Wend. R., 583, per J. Nelson; 1 R. S., 873, 874.

[4] Story on Bailm., § 599; Kennard v. Burton, 25 Maine R., 39.

to require the traveler in all cases to keep exactly to the right; if a carriage coming in any direction leave sufficient room for any other carriage, horse or passenger on their proper side of the way, it is a sufficient compliance with the law of the road.[1] Where the road is clear, the driver may go on what part of the road he thinks fit, and is not chargeable with the consequences, though by reason of his horses taking fright an injury is caused to a third person which might not have happened if he had been on the right side of the road.[2]

Under our statutes, wherever any persons, traveling with any carriages or other conveyances, shall meet on any turnpike road or public highway in this state, the persons so meeting shall seasonably turn their carriages to the right of the center of the road, so as to permit such carriages to pass without interference or interruption, under a penalty for every neglect or offence, to be recovered by the party injured.[3] On a question arising under this act, it was adjudged that by a sound construction of it, the parties are to keep to the right of the centre of the road, although it may be more difficult for one party to turn out than the other; the act was designed to settle and establish the rights of travelers in such a manner that there can be no mistake about them; and it does establish, upon consideration of public policy, a broad, general rule, which is strictly enforced, although sometimes it may operate inconveniently upon parties. It is not the centre of the smooth or most traveled part of the road which is the dividing line, but the centre of the worked part, although the whole of the smooth or most traveled path may be upon one side of that centre, unless the situation of the road is such that it is impracticable or extremely difficult for the party to turn out.[4]

The traveler on horseback meeting another horseman or vehicle on a public highway, is not required to turn out in

[1] Wordsworth v. Willan and others, 5 Esp. R., 273.
[2] Aston v. Heaven, 2 Esp. R., 533.
[3] 1 R. S., 873, 3d ed.
[4] Earing v. Lansing, 7 Wend. R., 185.

any particular direction;[1] all that is required is prudent care under existing circumstances. In England, on the contrary, it is adjudged that the rule of the road as to keeping the proper side applies to saddle horses as well as to carriages; and where a carriage and horse are to pass, the carriage must keep its proper side, and so must the horse. If, however, the driver of a carriage is on his proper side, and sees a horse coming furiously on the wrong side of the road, it is the duty of the driver of the carriage to give way and avoid an accident, although in so doing, he goes a little on what would otherwise be his wrong side of the road.[2]

Those who disregard either the usage or statute law of the road, cannot justly complain, when they are held responsible for any injuries which they may thereby occasion.[3] But the law or usage of the road is not the criterion of negligence: Hence, in an action where the defendant's carriage was on the wrong side of the road, and in attempting to pass on the near instead of the off side, plaintiff sustained damages, it was held that it was for the jury to decide the question of negligence, without regard to the law of the road.[4] In the crowded streets of a city, situations and circumstances frequently arise where a deviation from what is called the law of the road, is not only justifiable but absolutely necessary. For the driver must in all cases follow the safest course when he has a choice of different parts of the street or road.[5]

So, where two persons meet when traveling in their respective wagons on the public highway, and a collision takes place, and one of them is thereby thrown from his wagon and injured; in order that the person injured should be entitled to maintain an action for the damages sustained by him, the injury must appear not to have been caused by

[1] Dudley v. Bolles, 24 Wend. R., 465. The owner of the adjoining land may occupy that part of the sides of the road, not subject to the right of way. 6 Cowen R., 189.

[2] Turley v. Thomas, 8 Carr. and Payne R., 103.

[3] 25 Maine R., 46.

[4] Wayde v. Lady Case, 2 Dowl. and Ryl. R., 255.

[5] Jackson v. Tollett, 2 Stark. R., 37.

any want of care on his part to avoid it, although he was traveling in a manner prescribed by the statute and the other was not. The rule is, that if the party injured, by want of ordinary care, contributed to produce the injury, he will not be entitled to recover; but if he did not exercise ordinary care, and yet did not by the want of it contribute to produce the injury, he may recover.[1]

If the traveler deviate from the rule of the road, he is bound to use a greater degree of care and caution, and keep a more watchful look-out to avoid coming in contact with other vehicles, than is necessary where he remains on the right side of the road.[2] But the fact that he is on the wrong side of the road does not authorize or justify another in purposely riding or driving against him; for one person being in fault does not dispense with another using ordinary care for himself. So, one who is injured by an obstruction in a highway, against which he fell, cannot maintain an action for the injury if it appear that he was riding with great violence and want of ordinary care, but for which he might have seen and avoided the danger.[3] Where parties on the road meet on a sudden, and a collision ensues, the party driving on the wrong side of the road must answer for the damages, unless the other has been deficient in the exercise of ordinary care.[4] But his failure to decide suddenly, as to the means of avoiding a collision, is not such want of ordinary care in the person who is driving on the right side; the wrong-doer cannot escape the consequences of his negligent driving by alleging that it was possible for the injured party to have avoided the danger if he had decided correctly and acted on the instant.

The rule of the road does not apply with respect to a carriage and a foot passenger; for as regards foot passengers, a carriage may go on either side of the road. But a foot passenger has a right to cross the carriage road, and a person

[1] Kennard v. Burton, 25 Maine R., 39.
[2] Pluckwell v. Wilson, 5 Carr. and Payne R, 375.
[3] Butterfield v. Forrester, 11 East R., 60.
[4] Chaplin v. Hawes, 3 Carr. and Payne R., 554.

driving a carriage on it is liable to an action if he do not take care so as to avoid driving against him, while he is crossing the road; and if the person thus driving cannot pull up in time, because his reins break, that is no defence, since he is bound to provide himself with proper and sufficient tackle.[1]

Where a child, of such tender age as not to possess sufficient discretion to avoid danger, is permitted by his parents to be in a public highway without any one to guard him, and is there run over by a traveler and injured, no action lies against the traveler, if there be no pretence that the injury was voluntary or arose from culpable negligence on his part. In an action for such injury, if there be negligence on the part of the plaintiff, there cannot be a recovery; and although the child, by reason of his tender age, be incapable of using that ordinary care which is required of a discreet and prudent person, the want of such care on the part of his parents or guardians furnishes the same answer to an action by the child, as would its omission on the part of the plaintiff in an action by an adult.[2] In a city or large and populous village, much greater care is demanded of the driver.[3] Thus, in an action where it appeared that the defendant was driving a gig through one of the public streets of the city of New-York, very fast; that the plaintiff, a child under two years of age, ran into the street after some pigs towards the opposite side of the street; was observed by a woman at the window, who seeing the gig approach, called to the defendant to stop, which he did not do until after the child was knocked down by the horse or wheel of the gig; and the defendant was held answerable for the injury, though no willfulness was attributed to him.[4]

When boats meet on the canals, it is the duty of the master of each to turn out to the right hand, so as to be wholly on the right side of the centre of the canal. This is sub-

[1] Cotterill and wife v. Starkey, 8 Carr. and Payne R., 691.

[2] Hartfield v. Roper, 21 Wend. R., 615.

[3] 21 Wend. R., 618; M'Allister v. Hammond, 6 Cowen R., 342; Leame v. Bray, 3 East R., 597; 8 Wend. R., 469; 8 John. R., 421.

[4] 6 Cowen R., 342.

stantially like the law of the road; and in a case of collision the right of action depends upon the same principles. If both parties are equally in the wrong, neither can maintain an action against the other; for there is no legal injury where the loss is the result of the common fault of both parties.[1]

It is laid down by Mr. Justice Sutherland, as an established principle, that where an injury is occasioned by an unavoidable accident, no action will lie for it; but that where any blame is imputable to either party, though he had no intention to injure the other, he is liable for the damages sustained.[2] "When we speak of an unavoidable accident, in legal phraseology, we do not mean an accident which it was physically impossible, in the nature of things, for the defendant to have prevented; all that is meant is, that it was not occasioned, in any degree, either remotely or directly, by the want of such care or skill as the law holds every man bound to exercise. This is well illustrated by the case of Wakeman v. Robinson, 1 Bingham, 212; the defendant there was guilty both of negligence and unskillfulness. His horse was young and spirited, and he drove him without a curb-chain, in consequence of which he was less easily managed; in that, there was negligence; in his alarm the defendant pulled the wrong rein; there was want of skill; and on either or both grounds he was responsible for the consequences. But if his horse had been properly harnessed and skillfully managed, and the accident to the plaintiff had still occurred, it would have been held inevitable; although no one will question that the defendant had the physical power to have guarded against it, either by entirely stopping his horse the moment he saw the plaintiff's wagon, or by driving at a very slow and moderate pace; but this is a degree of caution which the law does not exact."[3]

[1] Rathbun v. Payne, 19 Wend. R., 399; Dygert v. Bradley, 8 Wend. R., 469.

[2] Weaver v. Ward, Hobart, 134; 3 East R., 593; Percival v. Hickey, 19 John. R., 289; 18 id., 383; 3 Wend. R., 391; Brownell v. Flagler, 5 Hill R., 282.

[3] The English rules for driving are, first, that in meeting each party shall bear or keep to the left; second, that in passing, the foremost person bearing to the

Duties by the way.

The carrier of passengers is bound to observe his established and advertised regulations in respect to stopping for refreshments, rest or other purposes by the way; for the passenger is supposed to take his passage with an understanding, from which the law implies an agreement, entitling him to the accommodations offered.[1] The time of departure from the intermediate places on the line, are frequently the main inducements in the choice of conveyance; and where there is a general usage to allow certain intervals for refreshment, the carriers cannot vary at their pleasure, those usages which are perhaps a reason for preferring their conveyance to the less convenient arrangement of other proprietors. But if the coachman refuses to wait, and actually leaves a passenger behind without good cause, it seems that the latter has a remedy, either in withholding the remainder of the fare, or, if that has all been paid, by an action on the case for a breach of the contract, namely, to convey the party to such a place at such a time; in which he may recover the actual damages he has sustained.[2]

The carrier who receives a passenger for a certain place, taking his passage money for the entire route, impliedly contracts to carry him to the place named, and is liable for any injury or losses which may occur on any part of the route, in respect to which the contract is made.[3] This is frequently done where different lines of stages or railroad companies run in connection with each other, thus extending the route over the entire distance occupied by the united lines or companies; so that the passenger in fact makes but one contract; as where a passenger took passage in the cars on the railroad from Saratoga Springs to Schenectady, and paid his fare to Albany, and delivered his baggage with a direction

left, the other shall pass on the off side; third, that in crossing, the coachman shall bear to the left hand, and pass behind the other carriage. Story on Bailm., § 599.

[1] Angell on Car., § 533.

[2] Jeremy on Car., 23.

[3] 19 Wend. R., 534.

for its conveyance to the same place. In this case the Saratoga and Schenectady Railroad Company cannot deny that they are carriers for a distance commensurate with what they engage for; and it is immaterial whether their road in fact extends to Schenectady or Albany. They have induced the passenger to give them credit as carriers for the entire distance, and are estopped from impeaching the contract so made.[1]

It seems that though the carrier is not bound to receive a notoriously bad character as a passenger, yet having received him as such, he is not at liberty, where the passenger has not been guilty of any bad conduct on the route, to turn him out of the conveyance. The contract to carry is valid, and cannot be rescinded at the pleasure of the party making the undertaking. Though the passenger be a vile person, if the carrier eject him from the conveyance under circumstances of opprobrium and disgrace, where he has not been guilty of any impropriety of conduct by the way, he is entitled to a fair compensation for the injury sustained, and may give in evidence the language used towards him in putting him out of the conveyance.[2]

In passing a place of danger, it is the duty of the carrier to give the passengers notice thereof so as to give them the option of proceeding or not; and this notice must be given in plain terms so as to afford an opportunity of avoiding the danger. The want of such notice, where it is the carrier's duty to give it, may be considered by the jury as evidence of negligence in the driver or agent, such as to make his principals liable in damages for any accident that may happen.[3]

In case of an accident, though by reason of its being unavoidable, the carrier is not answerable for its consequences, he is still bound to exercise the greatest diligence and care to anticipate and prevent to the utmost of his power subsequent injuries resulting or flowing from the same cause. If

[1] 19 Wend. R., 537; 8 id., 483.

[2] Coppin v. Braithwaite, 8 Jur., 875; 5 Harr. Dig., 299.

[3] Dudley v. Smith, 1 Campb. R., 167; Jeremy on Car., 29.

his carriage be broken or disabled, he is bound to stop instantly and have it repaired. The common carrier of goods, as we have seen, whose boat is stove in by running on a concealed snag under such circumstances as to make it an inevitable accident, is still answerable if he subsequently neglect the proper means of securing and landing the cargo. In like manner the carrier of passengers, though not responsible for an accident, may be chargeable with the consequences resulting from it. In other words, if it be within his power to prevent an injury after the accident has occurred, and he fails to do so, he must answer for his failure in duty.[1] Indeed, the slightest degree of neglect under such circumstances is sufficient to render him responsible in damages. His contract is not terminated by an inevitable accident; and hence he is still bound for the safety of his passengers, as far as human foresight and prudence will go.[2]

Passenger-carriers by water.

In most respects passenger-carriers by water are bound by the same duties and obligations as carriers by land; but there are some rules and regulations incident to the conveyance of passengers by water which deserve a separate consideration. The law imposes a certain responsibility upon the carrier in respect to the business, regarding the mode of conveyance as important to be considered only in the application of the principle.[3]

The duty to receive and carry safely is the same on the water as on the land; and the rule of diligence is the same.[4] In either case the carrier is answerable for the utmost care, vigilance and skill, on the part of himself and all persons employed by him.[5] And this degree of care and vigilance and skill is required in every branch of his business. He must take care that his carriage is road-worthy, and that his vessel is sea-worthy. His agents must be competent to per-

[1] Hall v. Connecticut River Steamboat Co., 13 Conn. R., 319.
[2] 4 Esp. R., 259; 13 Peters R., 181; 25 Maine R., 39.
[3] 13 Wend. R., 611.
[4] 2 Sumn. (Cir. Co.) R., 221.
[5] Farwell v. Boston and Worcester Railroad Cor., 4 Met. R., 49

form the duties they are intrusted to discharge, and he is responsible for the fidelity and skill with which they discharge them.[1]

Fewer cases have arisen against carriers of passengers on the seas than on the land, for the reason that personal injuries at sea, other than those which are common to passengers and crew, seldom happen; and as to those which do occur, the master and sailors have every motive which the love of life can furnish, to avoid the dangers of the voyage and bring their vessel safely into port. Nevertheless, it does occasionally happen that the master fails in his duty, by the omission of that care and diligence which the law demands.[2]

By the statutes of this state, every person navigating any boat or vessel for gain, who shall willfully receive so many passengers, or such a quantity of other lading, on board of such boat or vessel, that by means thereof such boat or vessel shall sink or overset and the life of any human being shall be endangered thereby, shall, upon conviction, be adjudged guilty of a misdemeanor. If the captain, or any other person having charge of a steamboat used for the conveyance of passengers, or if the engineer or other person having charge of the boiler of such boat, or of any apparatus therein used for the generation of steam, shall, from ignorance or gross neglect, or for the purpose of excelling any other boat in speed, create or allow to be created, such an undue quantity of steam, as to burst or break the boiler or other apparatus in which such steam shall be generated, or any apparatus or machinery connected therewith, by which bursting or breaking human life shall be endangered, every such captain, engineer or other person, shall be adjudged guilty of a misdemeanor.[3]

These provisions render the person in charge of the boat or vessel liable criminally, for his misconduct, whether he be a carrier or only the agent and servant of a carrier; and though they do not furnish the rule and measure of his duty, under the contract to carry passengers, it is certain that

[1] 13 Peters R., 181.

[2] See statutes in the Appendix.

[3] 2 R. S., 780, § 26, 27, 3d ed.

the carrier is answerable for any injury caused by a violation of the statute. The master on board has the control of the vessel, and must answer for mismanagement or neglect of duty;[1] but the other officers and servants acting under his command are clearly not liable on the contract for carriage, and as they are but servants, the public have no protection against their criminal neglect and misconduct but that which is furnished by the statute.[2]

By another statute of the state it is enacted that, whenever any steamboats shall meet each other on the Hudson river, or on any other waters within the jurisdiction of this state, each boat so meeting shall go towards that side of the river or lake which is to the starboard or right side of such boat, so as to enable the boats so meeting to pass each other with safety.[3] And whenever any steamboat is going in the same direction with another steamboat ahead of it, the first mentioned boat is not at liberty to approach or pass the other boat so being ahead, within the distance of twenty yards; nor is it lawful so to navigate the boat so being ahead as unnecessarily to bring it within twenty yards of the steamboat following it.[4] Every steamboat pursuing its course in the night time must carry and show two good and sufficient lights, one of them to be exposed near her bows, and the other near her stern, elevated at least twenty feet above her deck.[5] Rafts of timber or lumber in motion, on the Hudson, are required to show two red lights, one on each end of the raft, raised at least ten feet high.[6] Vessels at anchor on Lakes Ontario and Champlain, and on Rivers Niagara, Hudson and St. Lawrence, within the jurisdiction

[1] Snell, Stagg & Co. v. Rich, 1 John. R., 305.

[2] Noble & Palmer v. Paddock, 19 Wend. R., 456; Barnes v. Cole, 21 id., 188. Indictments for the violation of the statutes of this state may be found in any county, through which or any part of which, such vessel shall be navigated in the course of the same voyage or trip, or where the trip shall terminate. 2 R, S., 813, 3d ed.; The People v. Hulse, 3 Hill R., 309.

[3] 1 R. S., 859, § 1, 3d ed.

[4] Id., § 7.

[5] Id., § 8.

[6] Id., § 14.

of this state, must lower their peaks and show a good and sufficient light in some part of their rigging, at least twenty feet above deck and from the taffrail.[1]

The object of these several requirements of the statute law evidently is to enable each vessel to avoid the danger of collision, by holding out a signal light of warning to other vessels and craft navigating the same waters. The want of such a light, where it is regarded as a duty of law or custom to carry one, is a circumstance of neglect, for which, when it causes a collision, the carrier is answerable.[2] If the injury is attributable to the absence or want of a proper signal light, the owner of the boat must bear the consequences.[3] And it seems, that where the master has omitted to hang out the signal light as required by a positive law, the presumption of negligence is so strong against him, as to cast the burden of proof upon him to show that the injury was not the consequence of his neglect.[4]

Aside from statutory regulations on the subject, there is no uniform usage in respect to carrying lights.[5] But in a dark and foggy night, it is the imperative duty of the master to take every reasonable precaution to avoid the chances of a collision. In one case the court say: "It is unquestionably the duty of every master of a ship, whether in an intense fog or great darkness, to exercise the utmost vigilance, and to put his vessel under command so as to secure the best chance of avoiding all accidents, even though such precautions may occasion some delay in the prosecution of the voyage. It may be, that, for such a purpose, it would be his duty to take in his studding sails; but such is the constantly varying combination of circumstances, arising from locality, wind, tide, number of vessels in the track, and

[1] 1 R. S., 859, § 12, § 27, 3d ed.

The several provisions of the statutes are enforced by penalties prescribed for their violation, and the owners are responsible either as principals or sureties for the amounts recovered.

[2] Rathbun v. Payne, 19 Wend. R., 399.

[3] Barnes v. Cole, 21 Wend. R., 188.

[4] Waring v. Clarke, 5 How. (U. S.) R., 441.

[5] Carsley v. White, 21 Pick. R., 254.

other considerations, that the court cannot venture to lay down any general rule, which would absolutely apply in all cases."[1]

One of these precautions, which the master of a vessel is bound to take to avoid collision in a dark night, is to hang out a light in some conspicuous part of her rigging, elevated so that it may be seen afar, or as early as possible by other vessels passing that way. When a vessel is at anchor at the mouth of a harbor, in a much frequented track, or in the channel of a river, this is a duty which ought never to be dispensed with.[2] Though there be no positive rule or usage, requiring the master always in the night time to keep a light exhibted on his vessel, it is without dispute one of those means of avoiding danger which the master is sometimes bound to employ; but whether he is bound to use this specific precaution must depend upon the darkness of the night, the place, number of vessels passing, and all the other surrounding circumstances.[3]

In the case of Simpson v. Hand, which was an action for damages caused by running into a schooner, at anchor in the night time in the channel of the Delaware, Gibson, C. J., in delivering the opinion of the court, says:[4] "A vessel is doubtless not bound to show a light when she is moored out of harm's way; but vessels run at all hours on the Delaware; and it was proved to be a custom of the river to set a light in nights of unusual darkness; and though there is no positive law to enforce it, the neglect of it must give a false confidence to an approaching vessel which she would not feel if there was no custom at all. In such circumstances, a want of conformity to the custom is an allurement to disaster. Indeed, the hoisting of a light is a precaution so imperiously demanded by prudence, that I know not how the omission of it could be qualified by circumstances, any more than could the leaving of a crate of china

[1] The Itinerant, 2 W. Rob. R., 236.
[2] Simpson v. Hand, 6 Whart. (Penn.) R., 311.
[3] Carsley v. White, 21 Pick. R., 254.
[4] 6 Whart. R., 324.

in the track of a railroad car; or how it could be considered otherwise than as negligence *per se*."

The general duty of the master is to exercise due skill, care and caution in the navigation of his vessel, and he is to hang out a light of warning where that is the most appropriate and efficient, or the recognized mode of exercising the required care.[1] He is bound to keep a vigilant look-out for the same reason, and to use all proper precaution to avoid and prevent accidents; where he has done this, he is not responsible at common law; though in a court of admiralty, where a collision occurs from misfortune, the damages are apportioned between the vessels.[2]

Where there is a custom requiring lights, as that already mentioned on the Delaware, or a rule established as in England by an order of the Trinity-House, or a positive statute, such as we have in this state prescribing the duty to carry them in a particular manner under certain circumstances, if a collision occurs between steamers at night, and one of them has not signal lights, she will be held responsible for all losses until it is proved that the collision was not the consequence of it; and though she has lights, it is a circumstance of neglect if they be not properly and conspicuously placed.[3]

A rule emanating from the Trinity-House, although it does not constitute a law *per se*, is nevertheless regarded in England as a rule to be observed, having the approbation of the best masters, and being in most cases upheld by the authority of the high court of admiralty.[4] The Trinity-House was originally chartered and organized as a guild or fraternity, under a religious name, for the advancement of commerce and for the protection of ships and vessels by proper regulations. It began as a society of good sailors

[1] Steamboat Co. v. Whilldin, 4 Harring R., 228. On the Delaware the custom is that vessels going against tide keep in shore, whilst those going with the tide keep out in the strength of the tide. This rule qualifies the general rule that steamboats keep to the right in passing.

[2] Waring v. Clarke, 5 How. (U. S.) R., 441.

[3] 5 How. (U. S.) R., 502.

[4] The Duke of Sussex, 1 Wm. Rob. R., 274.

and experienced masters and nautical men, who were clothed with power to erect light-houses and other sea marks along the coast, to appoint pilots to conduct ships in and out of the River Thames, to settle the rates of pilotage, and among other things to hear and determine certain complaints of officers and seamen, under an appeal to the court of admiralty.[1] It has been from time to time variously modified, and now acts in respect to the general subject of navigation in a manner analogous to that of a board of merchants; its orders, without having the absolute and binding force of law, are treated as rules of good seamanship, of authority so far as, and because they are evidence of the customary laws and usages observed by men engaged in the business of navigation. The Trinity masters and brethren now serve as a kind of advisory jury to assist on trials in the court of admiralty.[2]

In many of the most frequented English ports there are Trinity-House regulations, requiring vessels at anchor to hang out lights as a signal to other vessels coming in, and prescribing that, on navigable rivers, crowded with commerce, ships that cast anchor for the night must exhibit the usual signal. The necessity of such signals, especially on rivers, harbors and channels, has been recognized in England and in this country by legislative enactments, requiring every steam vessel to exhibit signal lights between sunset and sunrise.[3] These statutes, passed with a view to the protection of passengers, show the importance attached to every precaution against the dangers of collision by night, and may be taken as illustrative of the care and diligence exacted of the carrier.[4] For, in the absence of a positive law the master

[1] The society was chartered by Henry VIII., 1515, and established and confirmed under the name of the master, wardens and assistants of the guild or fraternity of the most glorious and undivided Trinity, and of St. Clement, in the parish of Deptford, Strand, in the county of Kent. And it was allowed to receive a certain duty from ships for the support of light-houses.

[2] 1 Wm. Rob. R., 274; see McCullock's Dictionary.

[3] Act of Congress of 1838; see Appendix; 9 and 10 Vict., c. 100, § 9, 13.

[4] 5 How. R., 441.

is bound to take every reasonable and customary means of preventing such accidents.

The combination of circumstances, in which two meeting vessels find themselves, may be extensively varied by the state and direction of the wind, and the relative position of the vessels towards the wind and towards each other; and hence the law of the sea is continually modified to meet these changing circumstances. The analogous law of the road yields to emergencies, but not to so great an extent. In Lowry v. The Steamboat Portland, the presiding judge took the testimony of experienced navigators, who gave the following evidence:[1] "In our answers to former questions, we have stated the rule or usage to be, that when two vessels are approaching each other, both having the wind free, and consequently the power of readily controlling their movements, the vessel on the larboard tack shall give way, and thus each pass to the right. This rule should govern vessels, too, sailing on the wind, and approaching each other, when it is doubtful which is to windward. But if the vessel on the larboard tack is so far to windward, that if both persist in their course the other will strike her on the leeward side abaft the beam, or near the stern, in such case, the vessel on the starboard tack must give way, as she can do so with greater facility and less loss of time and distance, than the other. These rules are particularly intended to govern vessels approaching each other, under circumstances that prevent their course and movements being readily ascertained with accuracy; for instance, in a dark night, or dense fog. At other times, circumstances may render it expedient and proper to depart from them; for we consider them all subordinate to the rule prescribed by common sense, and applicable to all cases, under any circumstances, which is that every vessel shall keep clear of every other vessel when she has the power to do so, notwithstanding such other may have taken a course not conformable to estab-

[1] 1 Law Reporter (1839), 313, 318.

lished usage. We can scarcely imagine a case, in which it would be justifiable to persist in a course, after it had become evident that collision would ensue, if by changing such course the collision could be avoided."

The usages of the sea, which have grown up like the common law and been from time to time recognized by the courts, must be observed by all sailors and nautical men, as rules of authority; and whether recognized in the adjudged cases or resting merely in oral tradition, the violation of them is evidence of a want of good seamanship, raising a presumption against the vessel violating the usage.[1] The number and variety of these usages, as well as our present object, render it inexpedient and inappropriate here, to enter minutely into their consideration. It will suffice for us to state some of them in a brief manner, referring to the more elaborate works on shipping and navigation for a full investigation of the subject.

The Trinity-House regulations are of authority for the same reason as decisions at common law; not as making, but simply recognizing the existing law of usage and custom.[2] The decision of a court is the higher and more solemn evidence, but still only an evidence or witness of what the law is. In other words, the Trinity-House regulations do not purport to enact, but to state certain rules as recognized and established by the usages of navigation: such as, that a steam vessel passing another in a narrow channel, must always leave the vessel she is passing on the larboard hand: steam vessels are to be considered in the light of vessels navigating with a fair wind, on account of the control which the master has over her movements.[3]

When two sailing vessels meet, having the wind fair, the rule is, that each is to pass on the larboard hand. But if a vessel is going close-hauled to the wind, and another meeting her is going free, the rule at sea is, for the vessel meeting her to go to leeward; and the reason of it is, that other-

[1] Story on Bailm., § 611.

[2] The Duke of Sussex. 1 W. Rob. R., 274; 2 Kent's Comm., 230.

[3] The Friends, 1 W. Robinson (N. A.) R., 478.

wise the vessel going to windward would lose her position, and could not get in again, without another tack, and it would be an inconvenience to her, and not to the vessel going free. But the vessel having the wind may either go to leeward or windward, as she best can; she is bound to suppose, as a general rule, that the vessel going to windward will keep her position; that is to say, the ship which is going to windward is to keep to windward, and the ship that has the wind free is to bear away.[1] It is but a modification of this rule, that a vessel sailing before or with the wind, should make way for one that is sailing *by* or against it.[2] For the law imposes upon the vessel having the wind free or fair, the obligation of taking proper measures to get out of the way of the vessel that is close-hauled, and of showing that she has done so, and if she does not, the owners of it are responsible for the loss which ensues.[3]

As vessels that meet at sea may be crossing each other's track in every conceivable direction, it is impossible that any single rule should embrace all cases. But the principle animating these rules of navigation seems to be, that each vessel shall do its endeavor to avoid collision, and that that vessel shall give way or heave about to avoid the danger which can do so most easily and with the least inconvenience or loss of time.[4] On this ground, a vessel sailing with a fair wind and moving more rapidly, and being more under the control of her officers and crew than a vessel which has not the wind, is bound to give way. The reason of this rule applies to steamboats at all times, since they have always a propelling power, equal to a favorable wind, which renders the vessel perfectly manageable.[5] So, too, a vessel

[1] Handaysyde and others v. Wilson and others, 3 Carr. and Payne R., 528.

[2] Jameson v. Drinkald, 12 Moore R., 148.

[3] The Woodrop Sims, 2 Dodson's Rep., 83.

[4] 3 Kent's Comm., 230, 231.

[5] The Shannon, 2 Hagg. R., 173; Hawkins v. Dutchess & Orange Steamboat Co., 2 Wend. R., 452.

Action on the case for an injury to plaintiff's sloop by collision.

On the trial, it appeared that the vessels met just below the overslaugh below Albany; the sloop going down the river with a fair but light breeze at the

under sail must bear away from a vessel at anchor, because, being under motion, her direction may be easily changed.[1]

It is a rule of the Trinity-House, adopted by the court of admiralty, "that when steam vessels on different courses must unavoidably and necessarily cross so near that by continuing their respective courses there would be a risk of coming into collision, each vessel shall put her helm to port so as always to pass on the larboard side of each other."[2] And the rule is doubtless the same whether the vessel is engaged in carrying passengers or freight, or whether it is under the command of the master, or a pilot, who is considered master *pro hac vice*.[3] In Denison v. Seymour, it is adjudged that the master of a steamboat, employed in the transportation of passengers, like the master of a vessel engaged in the merchant service, is answerable for the diligence of all to whom is intrusted the management of the vessel, and that he is liable for any injury done by running the steamboat navigated by him against and sinking another vessel, although the pilot, who received his appointment directly from the owners, is at the wheel steering the boat,

rate of two miles an hour; the steamboat going up the river at the rate of six or seven miles an hour; the sloop had just crossed the bar in the usual channel, and necessarily ran near the eastern shore; the officers of both vessels hailed; the plaintiff on board of his sloop called to the officers of the steamboat to stop the engine; the pilot of the boat called to the plaintiff, who was at the helm of his sloop, to bear away; the plaintiff did bear away, but as he had but little headway on his vessel, he made but little progress; the engine of the steamboat was stopped, but the boat was not backed, as she might have been, and struck with her bow the waist of the plaintiff's sloop and injured her materially. By the court: "The real question is, whether the officers of the steamboat were not guilty of negligence in refusing or neglecting to exercise the power they possessed, which would have prevented the injury. The boat was perfectly under the control of its officers, the sloop was not; the officers of the boat did not endeavor to avoid the collision which they might have done either by backing their boat or by going on the west side of the sloop, where there was room enough and water enough. The sloop was compelled to go near the east shore, in order to pass the bar with safety, and after passing the bar, the captain did all in his power to avoid the collision by endeavoring to go west of the boat; but, from the slow motion of the sloop, this was impracticable before the boat struck him."

[1] The Neptune, 1 Dod. Adm. Rep., 467; 3 Kent Comm., 231.

[2] Duke of Sussex, 1 W. Robinson (N. A.) R., 274.

[3] Bussey v. Donaldson, 4 Dallas, 206.

and has at the time of the accident the exclusive control and direction of her course.[1] In another case, against the master of a steamboat for running foul of a sloop on the Hudson river, the recorder, before whom the cause was tried, charged the jury that the defendant was prima facie liable for the injury, and that it lay upon him to show that it did not arise from negligence on the part of those who navigated the steamboat; that the question of negligence was a question of fact for the jury, and if they were of opinion that the plaintiff's vessel might have been avoided by the exercise of due diligence and watchfulness, plaintiff would be entitled to a verdict, unless by reason of the darkness of the night the accident was caused by the absence of a signal light on board of the sloop, there being no want of care on the part of those in charge of the steamboat; and the charge was sustained.[2]

The owners are responsible for damages occasioned by the mismanagement of a ship, though under the care of a regular pilot and acting in obedience to his directions; and the pilot is answerable to them.[3] But the master of the vessel, not on board at the time, is not answerable for the negligent management of the vessel by a pilot.[4] And it is not clear upon what principle he is held liable in any case, while the vessel is wholly under the command and control of the pilot, especially where he has no choice in the selection of a pilot.[5] It is said, indeed, that he assumes the character of a master with a perfect knowledge of his responsibilities as such, and that if he is unwilling to be responsible for the negligence of the subordinate officers, he is at liberty to reject the service. This is in effect placing his responsibility upon a ground of public policy; for it certainly cannot arise out of the immediate transaction in which he is not the responsible actor.[6]

[1] 9 Wend. R., 9.

[2] Foot v. Wiswall, 14 John. R., 304.

[3] Neptune the Second, 1 Dodson R., 467.

[4] Snell and others v. Rich, 1 John. R., 305.

[5] 9 Wend. R., 9, 15, 16, per Savage, Ch. J.

[6] Nicholson v. Monnsey, 15 East R., 384; 8 Pick. R., 22; 1 John. R., 304; see the act of Geo. IV., c. 125; The Maria, 1 W. Rob. R., 95, 45; Gilp. (D. C.) R., 579.

The principles of liability in cases of collision as administered in courts of admiralty are briefly stated by Sir William Scott in the case of the Woodrop Sims: There are four possibilities under which an accident of this sort may occur. In the first place, it may happen without blame being imputable to either party; as where the loss is occasioned by a storm, or any other *vis major;* in that case the misfortune must be borne by the party on whom it happens to light; the other not being responsible to him in any degree. Secondly, a misfortune of this kind may arise where both parties are to blame; where there has been a want of due diligence on both sides; in such a case, the rule of law is, that the loss must be apportioned between them, as having been occasioned by the fault of both of them. Thirdly, it may happen by the misconduct of the suffering party only; and then the rule is, that the sufferer must bear his own burthen. Lastly, it may have been the fault of the ship which ran the other down; and in this case the injured party would be entitled to an entire compensation from the other.[1]

At common law the plaintiff cannot recover damages for an injury by collision or otherwise, attributable in any degree to his own neglect or want of due care, unless the defendant has been guilty of some intentional wrong.[2] In a case of mutual negligence, the common law does not interpose in order to make an equitable partition of the damages, as is frequently done in courts of admiralty.[3] If the plaintiff has exercised ordinary care, and the defendant has been guilty of negligence causing the injury, the action for damages may be sustained.[4] But the plaintiff cannot recover damages for an injury sustained by him in the act of resisting the defendant, or preventing him from the exercise of his legal right; as where the master of a freight boat on the canal refused to give the master of a packet boat, carrying passengers, the preference given him by statute in passing a

[1] 2 Dodson Rep., 83.

[2] Barnes v. Cole, 21 Wend. R., 188; 5 Hill R., 282.

[3] Harlow v. Humiston, 6 Cowen R., 189; 5 Hill R., 283, note a.

[4] 6 Cowen R., 192; Rathbun v. Payne, 19 Wend. R., 399; 1 Cowen R., 78

lock, and a collision ensued causing a slight injury to the freight boat.[1]

The manner of landing passengers from steamboats navigating the waters of this state, is prescribed in certain cases by statute, requiring that, where the landing is effected by the use of a small boat, the engine of the steamboat shall be stopped while the passenger is getting into the small boat or out of it on board of the steamboat, and during the passage of the small boat to and from the shore, with this exception, that during such landing and receiving of passengers, the engine of the boat may be put in motion in order to keep the steamboat in proper direction, and prevent her from drifting or being driven on shore, and also in order to give sufficient force to carry the small boat to the shore.[2] No passenger is permitted to enter the small boat, for the purpose of being landed, until it is completely afloat and wholly disengaged from the steamboat, except by a painter; the small boat to be supplied by a good and sufficient pair of oars, and to be signaled to the steamboat on leaving the shore and when she arrives at it.[3] These and similar enactments, serve but to particularize and specify duties already imposed upon the carrier, or involved in the general principle establishing his liability.

The same remark is applicable to the several acts of congress, regulating the carriage of passengers in merchant vessels, restricting the number to be received to the reasonable capacity of the vessel, and requiring that they shall be properly ventilated, and adequately supplied with provisions for the voyage. The duties of the carrier are minutely specified, and penalties are imposed for the violation of them, so as to afford to the public a sufficient guaranty for their fulfillment, and thereby to counteract the carrier's temptation to crowd a great number of passengers, frequently emigrants of the poorer class, into a small vessel, exposing them

[1] Farnsworth v. Groat, 6 Cowen R., 698. The navigation of the canals is regulated very minutely by the statutes, 1 R. S., 271, 3d ed.

[2] 1 R. S., 859, § 3, 4, 5, 3d ed.

[3] Id., § 2, 6.

to the diseases incident to a sea voyage, in an over crowded and badly ventilated vessel. It was found by experience that the passenger's remedy against the carrier, on his contract was not a sufficient protection against this kind of imposition; and hence the statute law has provided a means of vindictive punishment, in the shape of penalties, thus making the carrier's avarice and caution the pledge of fidelity in the discharge of his duties. In this way his love of gain is arrayed against itself, and made to neutralize its vicious properties.[1]

Steam vessels are subject to a further and different kind of temptation, as well as to other and more numerous dangers. Accordingly, those acts of congress which provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam, are of a much wider scope. They provide that such vessels shall be enrolled and licensed; that their boilers and machinery shall be duly inspected once every six months; that a certificate of such inspection shall be given and posted up in some conspicuous part of the boat; that the owners of such licensed boats shall employ a competent number of experienced and skillful engineers; that the steam shall be regulated and kept down in a particular manner; that every steam vessel engaged in the transportation of freight or passengers at sea or on the lakes shall carry two or more yawls or long-boats, according to her tonnage, each of which shall be competent to carry at least twenty persons; that each vessel shall be furnished with a suction hose and fire-engine and hose suitable to be worked in case of fire; that each vessel shall carry signal lights during the night; that a failure in these duties shall be visited by penalties and by indictment; that every captain, engineer, pilot or other person employed on such steam vessel by whose misconduct, negligence or inattention to his or their respective duties the life of any person on board may be destroyed, shall be deemed guilty of manslaughter, and on conviction sentenced to confine-

[1] See acts of 1847, 1848, 1849, in appendix.

ment at hard labor for a period not more than ten years; and that in all actions against the owners of steamboats for injuries arising to person or property from the bursting of the boiler of any steamboat, or the collapse of a flue, or other injurious escape of steam, the fact of such accident shall be taken as full *prima facie* evidence, sufficient to charge the defendant, or those in his employment, with negligence, until he shall show that no negligence has been committed by him or those in his employment.[1] Though these provisions do not establish any new principle of responsibility, they are of great importance as pointing out the particulars of the carrier's duty and furnishing to the public the means for its enforcement. As between the carrier and the passenger, a failure to comply with them is evidence of neglect, which in most cases of injury casts upon the carrier the burden of showing that the injury did not occur in consequence of his neglect or want of due diligence.

In order that the master may properly discharge the important and responsible duties imposed upon him, the law clothes him with authority to control the movements of his vessel, and to give directions in respect to the government of passengers and crew. Especially in cases of emergency, he is necessarily invested with large discretionary power; since obedience to his commands is often the only means of safety for the ship. But the master is bound in all cases to provide for the comfort and convenience of the passengers on board, by such attention as may mitigate the evils of a dangerous or protracted voyage.[2]

It is the duty of the master of a vessel to take care that she be tight and staunch and sea-worthy at the commencement of each voyage, and appropriately furnished with the tackle and apparel necessary for her safe navigation;[3] to sail at the time appointed and in the manner approved by skillful navigators; to pursue the direct course of the voyage

[1] See acts of 1838, 1843, in appendix.

[2] Chamberlain v. Chandler, 3 Mason R., 242; 1 id., 508.

[3] Wedderburn v. Bell, 1 Campb. R., 1.

without deviation;[1] and so far as possible to bring his vessel through the perils of the sea safely into port.[2] For the proper discharge of his difficult duties, it is necessary that the master be a person of experience and practical skill in the art of navigation; that he possess the intellectual and moral power of commanding and governing his vessel, and that he be clothed with the authority to meet and cope with the dangerous vicissitudes of the voyage, to the best advantage. For this purpose, while at sea, he has something like a dictatorial and autocratic power in the government of passengers as well as the crew, to the end that he may properly direct and control the movements of the vessel.[3]

[1] 6 Bing. R., 716.
[2] Abbott on Ship., 340.
[3] 3 Kent's Comm., 159.

APPENDIX.

LEGISLATIVE ENACTMENTS AND NOTES.

Chapter 421.

OF THE LAWS OF NEW-YORK, ENACTED IN 1855.

An Act *to regulate the liability of Hotel Keepers.*

Passed April 13, 1855.

The People of the State of New-York, represented in Senate and Assembly, do enact as follows:

§ 1. Whenever the proprietor or proprietors of any hotel shall provide a safe in the office of such hotel, or other convenient place for the safe keeping of any money, jewels or ornaments belonging to the guests of such hotel, and shall notify the guests thereof, by posting a notice (stating the fact that such safe is provided, in which such money, jewels or ornaments may be deposited) in the room or rooms occupied by such guest, in a conspicuous manner, and if such guest shall neglect to deposit such money, jewels or ornaments in such safe, the proprietor or proprietors of such hotel shall not be liable for any loss of such money, jewels or ornaments, sustained by such guest, by theft or otherwise.

§ 2. This act shall take effect immediately.

NOTE.

OF OUR INNES AND THOROWFAIRES.

CHAP. 16. 2 *Holingshed's Chronicle*, 246.

Those townes that we call thorowfaires have great and sumptuous innes builded in them, for the receiving of such travellers and strangers as pass to and fro. The manner of harbouring therein is not like that of some other countries, in which the host or goodman of the house doth chalenge a lordlie authoritie over his guests, but cleane otherwise, sith everie man may use his inne as his owne house in England, and have for his monie how great or little varietie of vittels, and what other service himselfe shall think expedient to call for. Our innes are also very well furnished with naperie, bedding, and tapesterie, especialie with naperie: for beside the linnen used at the tables which is commonlie washed dailie, is such and so much as belongeth unto the estate and calling of the guest. The commer is sure to lie in cleane sheets, wherein no man hath beene lodged since they came from the landresse, or out of the water wherein they were last washed. If the traveller have an horsse, his bed doth cost him nothing, but if he go on foot he is sure to paie a pennie for the same: but whether he be horsseman or footman if his chamber be once appointed he may carrie the kaie with him, as of his owne house so long as he lodgeth there. If he loose oughts whilest he abideth in the inne, the host is bound by a generall custome to restore the damage, so that there is no greater securitie anie where for travellers than in the greatest innes of England. Their horsses in like sort are walked, dressed and looked unto by certeine hostelers or hired servants, appointed at the charges of the goodman of the house, who in hope of extraordinarie reward will deal verie diligentlie after outward appearance in this their function and calling. Herein neverthelesse are manie of them blameworthie, in that they do not onlie deceive the beast oftentimes of his allowance by sundrie meanes, except their owners looke well to them; but also make such packs with slipper merchants which hunt after preie (for what place is sure from evill and wicked persons) that manie an honest man is spoiled of his goods as he travelleth to and fro, in which feat also the counsell of the tapsters or drawers of drinke, and chamberleins is not seldome behind or wanting. Certes I beleeve not that chapman or traveller in England is robbed by the waie without the knowledge of some of them, for when he cometh into the inne, and alighteth from his horsse, the hostler forthwith is verie busie to take downe his budget or capcase in

the yard from his sadle bow, which he peiseth in his hand to feel the weight thereof: or if he misse of this pitch, when the guest hath taken up his chamber, the chamberleine that looketh to the making of the beds, will be sure to remove it from the place where the owner hath set it as if it were to set it more convenientlie some where else, whereby he getteth an inkling whether it be monie or other short wares, and thereof giveth warning to such od ghests as hant the house and are of his confederacie, to the utter undoing of manie an honest yeoman as he journieth by the waie. The tapster in like sort for his part doth marke his behaviour, and what plentie of monie he draweth when he paieth the shot, to the like end: so that it shall be an hard matter to escape all their subtile practises. Some thinke it a gay matter to commit their budgets at their comming to the goodman of the house: but thereby they oft bewraie themselves. For albeit their monie be safe for the time that it is in his hands (for you shall not heare that a man is robbed in his inne) yet after their departure the host can make no warrantise of the same, sith his protection extendeth no further than the gate of his owne house: and there cannot be a surer token unto such as prie and watch for those booties, than to see anie ghest deliver his capcase in such manner. In all our innes we have plentie of ale, beere, and sundrie kinds of wine, and such is the capacitie of some of them that they are able to lodge two hundred or three hundred persons, and their horsses at ease, and thereto with a verie short warning make such provission for their diet, as to him that is unacquainted withall may seeme to be incredible. Howbeit of all in England there are no worse ins than in London, and yet manie are there far better than the best that I have heard of in anie foren countrie, if all circumstances be dulie considered. But to leave this and go in hand with my purpose. I will here set downe a table of the best thorowfaires and townes of greatest travell of England, in some of which there are twelve or thirteene such innes at the least, as I before did speake of. And it is a world to see how ech owner of them contendeth with other for goodnesse of intertainement of their guests, as about finesse and change of linnen, furniture of bedding, beautie of rooms, service at the table, costlinesse of plate, strength of drinke, varietie of wines, or well (being) of hosses. Finallie there is not so much omitted among them as the gorgeousnes of their verie signes at their doores, wherein some do consume thirtie or fortie pounds, a meere vanitie in mine opinion, but so vaine will they needs be, and that not onlie to give some outward token of the inne keepers welth, but also to procure good ghests to the frequenting of their houses in hope there to be well used.

Here follows a table of "waies or thorowfaires" with distances. These chronicles come down to the reign of Elizabeth, and this discription of the inns of England, given in the very words of the quaint old writer, is to be understood as applying to about that period. *See Macauley's History of England, vol.* 1, *page* 357, 358.

Act of 1819, Chap. 46.

An Act *regulating Passenger Ships and Vessels.*

§ 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That if the master or other person on board of any ship or vessel, owned in the whole or in part by a citizen or citizens of the United States, or the territories thereof, or by a subject or subjects, citizen or citizens, of any foreign country, shall after the first day of January next, take on board of such ship or vessel, at any foreign port or place, or shall bring or convey into the United States, or the territories thereof, from any foreign port or place; or shall carry, convey, or transport, from the United States, or the territories thereof to any foreign port or place, a greater number of passengers than two for every five tons of such ship or vessel, according to custom-house measurement, every such master or other person so offending, and the owner or owners of such ship or vessel, shall severally forfeit and pay to the United States, the sum of one hundred and fifty dollars, for each and every passenger so taken on board of such ship or vessel over and above the aforesaid number of two to every five tons of such ship or vessel; to be recovered by suit, in any circuit or district court of the United States, where the said vessel may arrive, or where the owner or owners aforesaid may reside: *Provided, nevertheless*, That nothing in this act shall be taken to apply to the complement of men usually and ordinarily employed in navigating such ship or vessel.

§ 2. *And be it further enacted*, That if the number of passengers so taken on board of any ship or vessel as aforesaid, or conveyed or brought into the United States, or transported therefrom as aforesaid, shall exceed the said proportion of two to every five tons of such ship or vessel, by the number of twenty passengers, in the whole, every such ship or vessel shall be deemed and taken to be forfeited to the United States, and shall be prosecuted and distributed in the same manner in which the forfeitures and penalties are recovered and distributed under

the provisions of the act entitled "an act to regulate the collection of duties on imports and tonnage."

§ 3. *And be it further enacted*, That every ship or vessel bound on a voyage from the United States to any port on the continent of Europe, at the time of leaving the last port whence such ship or vessel shall sail, shall have on board, well secured under deck, at least sixty gallons of water, one hundred pounds of salted provisions, one gallon of vinegar and one hundred pounds of wholesome ship bread, for each and every passenger on board such ship or vessel, over and above such other provisions, stores, and live stock, as may be put on board by such master or passenger for their use, or that of the crew of such ship or vessel; and in like proportion for a shorter or longer voyage; and if the passengers, on board of such ship or vessel in which the proportion of provisions herein directed shall not have been provided, shall at any time be put on short allowance, in water, flesh, vinegar, or bread, during any voyage aforesaid, the master and owner of such ship or vessel shall severally pay to each and every passenger who shall have been put on short allowance as aforesaid, the sum of three dollars for each and every day they may have been on such short allowance; to be recovered in the same manner as seamen's wages are, or may be recovered.

§ 4. *And be it further enacted*, That the captain or master of any ship or vessel arriving in the United States, or any of the territories thereof from any foreign place whatever, at the same time that he delivers a manifest of the cargo, and, if there be no cargo, then at the time of making report or entry of the ship or vessel, pursuant to the existing laws of the United States, shall also deliver and report to the collector of the district in which such ship or vessel shall arrive, a list or manifest of all the passengers taken on board of the said ship or vessel at any foreign port or place; in which list or manifest it shall be the duty of the said master to designate particularly, the age, sex and occupation of the said passengers respectively, the country to which they severally belong, and that of which it is their intention to become inhabitants; and shall further set forth whether any and what number, have died on the voyage; which report and manifest shall be sworn to by the said master, in the same manner as directed by the existing laws of the United States, in relation to the manifest and cargo; and that the refusal or neglect of the master aforesaid, to comply with the provisions of this section, shall incur the same penalties, disabilities and forfeitures, as are at present provided for a refusal or neglect to report and deliver a manifest of the cargo aforesaid.

§ 5. *And be it further enacted*, That each and every collector of the customs, to whom such manifest or list of passengers as aforesaid shall be delivered, shall quarter-yearly, return copies thereof to the secretary of state of the United States, by whom statements of the same shall be laid before congress at each and every session.

Approved March 2, 1819.

Act of 1838, Chap. 191.

An Act *to provide for the better security of the lives of passengers on board of vessels, propelled in whole or in part by steam.*

§ 1. *Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled*, That it shall be the duty of all owners of steamboats, or vessels propelled in whole or in part by steam, on or before the first day of October, one thousand eight hundred and thirty-eight, to make a new enrollment of the same, under the existing laws of the United States, and take out from the collector or surveyor of the port, as the case may be, where such vessel is enrolled, a new license, under such conditions as are now imposed by law, and as shall be imposed by this act.

§ 2. *And be it further enacted*, That it shall not be lawful for the owner, master or captain of any steamboat or vessel, propelled in whole or in part by steam, to transport any goods, wares and merchandise or passengers, in and upon the bays, lakes, rivers or other navigable waters of the United States, from and after said first day of October, one thousand eight hundred and thirty-eight; without having first obtained, from the proper officer, a license under the existing laws, and without having complied with the conditions imposed by this act; and for each and every violation of this section, the owner or owners of said vessel shall forfeit and pay to the United States the sum of five hundred dollars, one-half for the use of the informer; and for which sum or sums the steamboat or vessel so engaged shall be liable, and may be seized and proceeded against summarily, by way of libel, in any district court of the United States having jurisdiction of the offence.

§ 3. *And be it further enacted*, That it shall be the duty of the district judge of the United States, within whose district any ports of entry or delivery may be, on the navigable waters, bays, lakes and rivers of the United States, upon the application of the master or owner of any steamboat or vessel propelled in whole or in part by

steam, to appoint, from time to time, one or more persons skilled and competent to make inspections of such boats and vessels, and of the boilers and machinery employed in the same, who shall not be interested in the manufacture of steam-engines, steamboat boilers, or other machinery belonging to steam vessels, whose duty it shall be to make such inspection when called upon for that purpose, and to give to the owner or master of such boat or vessel duplicate certificates of such inspection; such persons, before entering upon the duties enjoined by this act, shall make and subscribe an oath or affirmation before said district judge, or other officer duly authorized to administer oaths, well, faithfully and impartially to execute and perform the services herein required of them.

§ 4. *And be it further enacted*, That the person or persons who shall be called upon to inspect the hull of any steamboat or vessel, under the provisions of this act, shall, after a thorough examination of the same, give to the owner or master, as the case may be, a certificate, in which shall be stated the age of the said boat or vessel, when and where originally built, and the length of time the same has been running. And he or they shall also state whether, in his or their opinion, the said boat or vessel is sound, and in all respects sea-worthy, and fit to be used for the transportation of freight or passengers; for which service, so performed upon each and every boat or vessel, the inspectors shall each be paid and allowed, by said master or owner applying for such inspection, the sum of five dollars.

§ 5. *And be it further enacted*, That the person or persons who shall be called upon to inspect the boilers and machinery of any steamboat or vessel, under the provisions of this act, shall, after a thorough examination of the same, make a certificate, in which he or they shall state his or their opinion whether said boilers are sound and fit for use, together with the age of said boilers; and duplicates thereof shall be delivered to the owner or master of such vessel, one of which it shall be the duty of said master and owner to deliver to the collector or surveyor of the port whenever he shall apply for a license, or for a renewal of a license; the other he shall cause to be posted up, and kept in some conspicuous part of said boat, for the information of the public; and for each and every inspection so made, each of the said inspectors shall be paid, by the said master or owner applying, the sum of five dollars.

§ 6. *And be it further enacted*, That it shall be the duty of the owners and masters of steamboats to cause the inspection provided under the fourth section of this act to be made at least once in every

twelve months; and the examination required by the fifth section, at least once in every six months; and deliver to the collector or surveyor of the port where his boat or vessel has been enrolled or licensed, the certificate of such inspection; and, on failure thereof, he or they shall forfeit the license granted to such boat or vessel, and be subject to the same penalty as though he had run said boat or vessel without having obtained such license to be recovered in like manner. And it shall be the duty of the owners and masters of the steamboats licensed in pursuance of the provisions of this act, to employ on board of their respective boats a competent number of experienced and skillful engineers; and, in case of neglect to do so, the said owners and masters shall be held responsible for all damages to the property of any passenger on board of any boat occasioned by an explosion of the boiler, or any derangement of the engine or machinery of any boat.

§ 7. *And be it further enacted*, That whenever the master of any boat or vessel, or the person or persons charged with navigating said boat or vessel, which is propelled in whole or in part by steam, shall stop the motion or headway of said boat or vessel, or when said boat or vessel shall be stopped for the purpose of discharging or taking in cargo, fuel or passengers, he or they shall open the safety-valve, so as to keep the steam down in said boiler as near as practicable to what it is when the said boat or vessel is under headway, under the penalty of two hundred dollars for each and every offence.

§ 8. *And be it further enacted*, That it shall be the duty of the owner and master of every steam vessel engaged in the transportation of freight or passengers, at sea, or on the Lakes Champlain, Ontario, Erie, Huron, Superior and Michigan, the tonnage of which vessel shall not exceed two hundred tons, to provide and to carry with the said boat or vessel, upon each and every voyage, two long boats or yawls, each of which shall be competent to carry at least twenty persons; and where the tonnage of said vessel shall exceed two hundred tons, it shall be the duty of the owner and master to provide and carry, as aforesaid, not less than three long-boats or yawls, of the same or larger dimensions; and for every failure in these particulars, the said master and owner shall forfeit and pay three hundred dollars.

§ 9. *And be it further enacted*, That it shall be the duty of the master and owner of every steam vessel employed on either of the lakes mentioned in the last section, or on the sea, to provide, as a part of the necessary furniture, a suction-hose and fire-engine and hose suitable to be worked on said boat in case of fire, and carry the same upon each and every voyage, in good order; and that iron rods or

chains shall be employed and used in the navigating of all steamboats, instead of wheel or tiller ropes; and for a failure to do which, they, and each of them, shall forfeit and pay the sum of three hundred dollars.

§ 10. *And be it further enacted*, That it shall be the duty of the master and owner of every steamboat, running between sunset and sunrise, to carry one or more signal lights that may be seen by other boats navigating the same waters, under the penalty of two hundred dollars.

§ 11. *And be it further enacted*, That the penalties imposed by this act may be sued for and recovered in the name of the United States, in the district or circuit court of such district or circuit where the offence shall have been committed, or forfeiture incurred, or in which the owner or master of said vessel may reside, one-half to the use of the informer, and the other to the use of the United States; or the said penalty may be prosecuted for by indictment in either of the said courts.

§ 12. *And be it further enacted*, That every captain, engineer, pilot, or other person employed on board of any steamboat or vessel, propelled in whole or in part by steam, by whose misconduct, negligence, or inattention to his or their respective duties, the life or lives of any person or persons on board said vessel may be destroyed, shall be deemed guilty of manslaughter, and, upon conviction thereof before any circuit court in the United States, shall be sentenced to confinement at hard labor for a period not more than ten years.

§ 13. *And be it further enacted*, That in all suits and actions against proprietors of steamboats, for injuries arising to person or property from the bursting of the boiler of any steamboat, or the collapse of a flue, or other injurious escape of steam, the fact of such bursting, collapse, or injurious escape of steam shall be taken as full *prima facie* evidence, sufficient to charge the defendant, or those in his employment, with negligence, until he shall show that no negligence has been committed by him or those in his employment.

Approved July 7, 1838.

Act of 1843, Chap. 94.

An Act *to modify the act entitled "An act to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam," approved July seventh, eighteen hundred and thirty-eight.*

§ 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That every boat or vessel which existing laws require to be registered, and which is propelled in whole or in part by steam, shall be provided with such additional apparatus or means as, in the opinion of the inspector of steamboats, shall be requisite to steer the boat or vessel, to be located in such part of the boat or vessel as the inspector may deem best to enable the officers and crew to steer and control the boat or vessel, in case the pilot or man at the wheel is driven from the same by fire; and no boat or vessel, exclusively propelled by steam, shall be registered, after the passage of this act, unless the owner, master or other proper person, shall file with the collector or other proper officer the certificate of the inspector, stating that suitable means have been provided to steer the boat or vessel, in case the pilot or man at the wheel is driven therefrom by fire.

§ 2. *And be it further enacted*, That it shall be lawful in all vessels or boats, propelled in whole or in part by steam, and which shall be provided with additional apparatus or means to steer the same, as required by the first section of this act, to use wheel or tiller ropes, composed of hemp or other good and sufficient material, around the barrel or axle of the wheel, and to a distance not exceeding twenty-two feet therefrom, and also in connecting the tiller or rudder yoke with iron rods or chains used for working the rudder: *Provided*, That no more rope for this purpose shall be used than is sufficient to extend from the connecting points of the tiller or rudder yoke, placed in any working position beyond the nearest blocks or rollers and give sufficient play, to work the ropes on such blocks or rollers: *And provided further*, That there shall be chains extending the whole distance of the ropes, so connected with the tiller or rudder yoke, and attached or fastened to the tiller or rudder yoke and the iron chains or rods extending towards the wheel, in such manner as will take immediate effect, and work the rudder in case the ropes are burnt or otherwise rendered useless.

§ 3. *And be it further enacted*, That the master and owner, and all others interested in vessels navigating Lakes Champlain, Ontario, Erie, Huron, Superior and Michigan, or any of them, and which are pro-

pelled by sails and Erickson's propeller, and used exclusively in carrying freight, shall from and after the passage of this act be exempt from liability or fine for failing to provide as a part of the necessary furniture of such vessel, a suction-hose and fire-engine and hose suitable to be worked on such vessel in case of fire, or more than one long-boat or yawl.

§ 4. *And be it further enacted*, That it shall be lawful for the court before which any suit, information, or indictment is or shall be pending for the violation, before the passage of this act, of so much of the ninth section of the act aforesaid, as requires "that iron rods or chains shall be employed and used in the navigation of all steamboats, instead of wheel and tiller ropes," to order such suit, information or indictment to be discontinued, on such terms as to costs as the court shall judge to be just and reasonable: *Provided*, That the defendant or defendants in such prosecution shall cause it to appear, by affidavit or otherwise, to the satisfaction of the court, that he or they had failed to use iron rods or chains in the navigation of his or their boat or boats, from a well grounded apprehension that such rods or chains could not be employed for the purpose aforesaid with safety.

§ 5. *And be it further enacted*, That in execution of the authority vested in him by the second section of the joint resolution, "authorizing experiments to be made for the purpose of testing Samuel Colt's sub-marine battery, and for other purposes." Approved August thirty-first, one thousand eight hundred and forty-two, the secretary of the navy shall appoint a board of examiners, consisting of three persons, of thorough knowledge as to the structure and use of the steam-engine, whose duty it shall be to make experimental trials of such inventions and plans designed to prevent the explosion of steam-boilers and collapsing of flues, as they may deem worthy of examination, and report the result of their experiments, with an expression of their opinion as to the relative merits and efficacy of such inventions and plans; which report the secretary shall cause to be laid before congress, at its next session. It shall also be the duty of said examiners to examine and report the relative strength of copper and iron boilers of equal thickness, and what amount of steam to the square inch each, when sound, is capable of working with safety; and whether hydrostatic pressure, or what other plan is best for testing the strength of boilers under the inspection laws; and what limitations as to the force or pressure of steam to the square inch, in proportion to the ascertained capacity of a boiler to resist, it would be proper to establish by law for the more certain prevention of explosions.

§ 6. *And be it further enacted*, That so much of the act aforesaid as is inconsistent with the provisions of this act shall be, and the same is hereby repealed.

Approved March 3, 1843.

Act of 1847, Chap. 16.

An Act *to regulate the carriage of passengers in merchant vessels.*

§ 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That if the master of any vessel owned in whole or in part by a citizen of the United States of America, or by a citizen of any foreign country shall take on board such vessel, at any foreign port or place, a greater number of passengers than in the following proportion to the space occupied by them and appropriated for their use, and unoccupied by stores, or other goods, not being the personal luggage of such passengers, that is to say, on the lower deck or platform one passenger for every fourteen clear superficial feet of deck, if such vessel is not to pass within the tropics during such voyage; but if such vessel is to pass within the tropics during such voyage, then one passenger for every twenty such clear superficial feet of deck, and on the orlop deck (if any) one passenger for every thirty such superficial feet in all cases, with intent to bring such passengers to the United States of America, and shall leave such port or place with the same, and bring the same or any number thereof, within the jurisdiction of the United States aforesaid, or if any such master of vessel shall take on board of his vessel, at any port or place within the jurisdiction of the United States aforesaid, any greater number of passengers than the proportions aforesaid admit, with intent to carry the same to any foreign port or place, every such master shall be deemed guilty of a misdemeanor, and, upon conviction thereof before any circuit or district court of the United States aforesaid, shall, for each passenger taken on board beyond the above proportions, be fined in the sum of fifty dollars, and may also be imprisoned for any term not exceeding one year: *Provided*, That this act shall not be construed to permit any ship or vessel to carry more than two passengers to five tons of such ship or vessel.

§ 2. *And be it further enacted*, That if the passengers so taken on board of such vessel, and brought into or transported from the United States aforesaid, shall exceed the number limited by the last section to the number of twenty in the whole, such vessel shall be forfeited to the

United States aforesaid, and be prosecuted and distributed as forfeitures are under the act to regulate duties on imports and tonnage.

§ 3. *And be it further enacted*, That if any such vessel as aforesaid shall have more than two tiers of berths, or in case, in such vessel, the interval between the floor and the deck or platform beneath shall not be at least six inches, and the berths well constructed, or in case the dimensions of such berths shall not be at least six feet in length, and at least eighteen inches in width, for each passenger as aforesaid, then the master of said vessel, and the owners thereof, severally shall forfeit and pay the sum of five dollars for each and every passenger on board of said vessel on such voyage, to be recovered by the United States as aforesaid, in any circuit or district court of the United States where such vessel may arrive, or from which she sails.

§ 4. *And be it further enacted*, That, for the purposes of this act, it shall in all cases be computed that two children, each being under the age of eight years, shall be equal to one passenger, and that children under the age of one year shall not be included in the computation of the number of passengers.

§ 5. *And be it further enacted*, That the amount of the several penalties imposed by this act shall be liens on the vessel or vessels violating its provisions; and such vessel may be libelled and sold therefor in the district court of the United States aforesaid, in which such vessel shall arrive.

Approved February 22, 1847.

Act of 1848, Chap. 41.

An Act *to provide for the ventilation of passenger vessels, and for other purposes.*

§ 1. *Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled*, That all vessels, whether of the United States or any other country, having sufficient capacity according to law for fifty or more passengers (other than cabin passengers), shall, when employed in transporting such passengers between the United States and Europe, have on the upper deck, for the use of such passengers, a house over the passenger-way leading to the apartment allotted to such passengers below deck, firmly secured to the deck, or combings of the hatch, with two doors, the sills of which shall be at least one foot above the deck, so constructed that one door or window in such house-way, at all times be left open for ventilation;

and all vessels so employed, and having the capacity to carry one hundred and fifty passengers, or more, shall have two such houses; and the stairs or ladder leading down to the aforesaid apartment shall be furnished with a hand-rail of wood or strong rope: *Provided, nevertheless*, booby hatches may be substituted for such houses in vessels having three permanent decks.

§ 2. *And be it further enacted*, That every such vessel so employed, and having the legal capacity for more than one hundred such passengers, shall have at least two ventilators to purify the apartment or apartments occupied by such passengers; one of which shall be inserted in the after part of the apartment or apartments, and the other shall be placed in the forward portion of the apartment or apartments, and one of them shall have an exhausting cap to carry off the foul air, and the other a receiving cap to carry down the fresh air; which said ventilators shall have a capacity proportioned to the size of the apartment or apartments to be purified: namely, if the apartment or apartments will lawfully authorize the reception of two hundred such passengers, the capacity of such ventilators shall each of them be equal to a tube of twelve inches diameter in the clear, and in proportion for larger or smaller apartments; and all said ventilators shall rise at least four feet six inches above the upper deck of any such vessel, and be of the most approved form and construction: *Provided*, That if it shall appear, from the report to be made and approved, as provided in the seventh section of this act, that such vessel is equally well ventilated by any other means, such other means of ventilation shall be deemed and held to be a compliance with the provisions of this section.

§ 3. *And be it further enacted*, That every vessel carrying more than fifty such passengers shall have for their use on deck, housed and conveniently arranged, at least one camboose or cooking range, the dimensions of which shall be equal to four feet long and one foot six inches wide for every two hundred passengers; and provisions shall be made in the manner aforesaid in this ratio for a greater or less number of passengers: *Provided, however*, And nothing herein contained shall take away the right to make such arrangements for cooking between decks, if it shall be deemed desirable.

§ 4. *And be it further enacted*, That all vessels employed as aforesaid shall have on board, for the use of such passengers, at the time of leaving the last port whence such vessel shall sail, well secured under deck, for each passenger, at least fifteen pounds of good navy bread, ten pounds of rice, ten pounds of oatmeal, ten pounds of wheat flour, ten pounds of peas and beans, thirty-five pounds of potatoes, one pint of vinegar, sixty gallons of fresh water, ten pounds of salted pork free

of bone, all to be of good quality, and a sufficient supply of fuel for cooking; but at places where either rice, oatmeal, wheat flour, or peas and beans cannot be procured, of good quality and on reasonable terms, the quantity of either or any of the last named articles may be increased and substituted therefor; and in case potatoes cannot be procured on reasonable terms, one pound of either of said articles may be substituted in lieu of five pounds of potatoes, and the captains of such vessels shall deliver to each passenger at least one-tenth part of the aforesaid provisions weekly, commencing on the day of sailing, and daily at least three quarts of water, and sufficient fuel for cooking; and if the passengers on board of any such vessel in which the provisions, fuel and water herein required shall not have been provided as aforesaid, shall at any time be put on short allowance during any voyage, the master or owner of any such vessel shall pay to each and every passenger who shall have been put on short allowance the sum of three dollars for each and every day they have been on such short allowance, to be recovered in the circuit or district court of the United States: *Provided, nevertheless,* And nothing herein contained shall prevent any passenger, with the consent of the captain, from furnishing for himself the articles of food herein specified; and, if put on board in good order, it shall fully satisfy the provisions of this act so far as regards food: *And provided further,* That any passenger may also, with the consent of the captain, furnish for himself an equivalent for the articles of food required in other and different articles; and if, without waste and neglect on the part of the passenger, or inevitable accident, they prove insufficient, and the captain shall furnish comfortable food to such passengers, during the residue of the voyage, this, in regard to food, shall also be a compliance with the terms of this act.

§ 5. *And be it further enacted,* That the captain of any such vessel so employed, is hereby authorized to maintain good discipline, and such habits of cleanliness among such passengers as will tend to the preservation and promotion of health; and to that end, he shall cause such regulations as he may adopt for this purpose, to be posted up, before sailing, on board such vessel, in a place accessible to such passengers, and shall keep the same so posted up during the voyage; and it is hereby made the duty of said captain, to cause the apartment occupied by such passengers to be kept, at all times, in a clean, healthy state, and the owners of every such vessel so employed are required to construct the decks, and all parts of said apartment so that it can be thoroughly cleansed; and they shall also provide a safe, convenient privy or water closet for the exclusive use of every one hundred such

passengers. And when the weather is such that said passengers cannot be mustered on deck with their bedding, it shall be the duty of the captain of every such vessel, to cause the deck occupied by such passengers to be cleaned (cleansed) with chloride of lime, or some other equally efficient disinfecting agent, and also at such other times as said captain may deem necessary.

§ 6. *And be it further enacted*, That the master and owner or owners of any such vessel so employed, which shall not be provided with the house or houses over the passage-ways, as prescribed in the first section of this act; or with ventilators, as prescribed in the second section of this act; or with the cambooses or cooking ranges with the houses over them, as prescribed in the third section of this act; shall severally forfeit and pay to the United States, the sum of two hundred dollars for each and every violation of, or neglect to conform to the provisions of each of said sections; and fifty dollars for each and every neglect or violation of any of the provisions of the fifth section of this act; to be recovered by suit in any circuit or district court of the United States, within the jurisdiction of which the said vessel may arrive, or from which it may be about to depart, or at any place within the jurisdiction of such courts, wherever the owner or owners, or captain of such vessel may be found.

§ 7. *And be it further enacted*, That the collector of the customs, at any port in the United States at which any vessel so employed shall arrive, or from which any such vessel shall be about to depart, shall appoint and direct one of the inspectors of the customs for such port to examine such vessel, and report in writing to such collector whether the provisions of the first, second, third and fifth sections of this act have been complied with in respect to such vessel; and if such report shall state such compliance, and be approved by such collector, it shall be deemed and held as conclusive evidence thereof.

§ 8. *And be it further enacted*, That the first section of the act entitled "An act to regulate the carriage of passengers in merchant vessels," approved February twenty-second, eighteen hundred and forty-seven, be so amended that, when the height or distance between the decks of the vessels referred to in the said section shall be less than six feet, and not less than five feet there shall be allowed to each passenger sixteen clear superficial feet on the deck, instead of fourteen, as prescribed in said section; and if the height or distance between the decks shall be less than five feet, there shall be allowed to each passenger twenty-two clear superficial feet on the deck; and if the master of any such vessel shall take on board his vessel, in any port of the United States, a greater number of

passengers than is allowed by this section, with the intent specified in said first section of the act of eighteen hundred and forty-seven, or if the master of any such vessel shall take on board at a foreign port, and bring within the jurisdiction of the United States, a greater number of passengers than is allowed by this section, said master shall be deemed guilty of a misdemeanor, and upon a conviction thereof shall be punished in the manner provided for the punishment of persons convicted of a violation of the act aforesaid; and in computing the number of passengers on board such vessels, all children under the age of one year at the time of embarcation, shall be excluded from such computation.

§ 9. *And be it further enacted*, That this act shall take effect, in respect to such vessels sailing from ports in the United States, in thirty days from the time of its approval; and in respect to every such vessel sailing from ports in Europe, in sixty days after such approval; and it is hereby made the duty of the secretary of state to give notice, in the ports of Europe, of this act, in such manner as he may deem proper.

§ 10. *And be it further enacted*, That so much of the first section of the act entitled "An act regulating passenger ships and vessels," approved March second, eighteen hundred and nineteen, or any other act that limits the number of passengers to two for every five tons, is hereby repealed.

Approved May 17, 1848.

Act of 1849, Chap. 111.

An Act *to extend the provisions of all laws now in force relating to the carriage of passengers in merchant vessels, and the regulations thereof.*

§ 1. *Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled*, That all vessels bound from any port in the United States to any port or place in the Pacific Ocean, or on its tributaries, or from any such port or place to any port in the United States on the Atlantic or its tributaries, shall be subject to the provisions of all the laws now in force relating to the carriage of passengers in merchant vessels, sailing to and from foreign countries, and the regulations thereof; except the fourth section of the "Act to provide for the ventilation of passenger vessels, and for other purposes," approved May seventeenth, eighteen hundred and forty-eight, relating to provisions, water and fuel; but the owners and masters of all such vessels shall in all cases furnish to each passenger the daily

supply of water therein mentioned, and they shall furnish, or cause the passengers to furnish for themselves, a sufficient supply of good and wholesome food; and in case they shall fail to do so, or shall provide unwholesome or unsuitable provisions, they shall be subject to the penalty provided in said fourth section in case the passengers are put on short allowance of water or provisions.

§ 2. *And be it further enacted*, That the act entitled "An act to regulate the carriage of passengers in merchant vessels," approved February twenty-second, eighteen hundred and forty-seven, shall be so amended as that a vessel passing into or through the *tropics* shall be allowed to carry the same number of passengers as vessels that do not enter the tropics.

§ 3. *And be it further enacted*, That this act shall take effect on and after the fifteenth day of March, eighteen hundred and forty-nine.

Approved March 3, 1849.

Act of 1851, Chap. 43.

An Act *to limit the liability of ship owners, and for other purposes.*

§ 1. *Be it enacted by the Senate and House of Representatives of the United States in Congress assembled*, That no owner or owners of any ship or vessel shall be subject or liable to answer for or make good to any one or more person or persons any loss or damage which may happen to any goods or merchandise whatsoever, which shall be shipped, taken in, or put on board any such ship or vessel, by reason or by means of any fire happening to or on board the ship or vessel, unless such fire is caused by the design or neglect of such owner or owners: *Provided*, That nothing in this act contained, shall prevent the parties from making such contract as they please, extending or limiting the liability of ship-owners.

§ 2. *And be it further enacted*, That if any shipper or shippers of platina, gold, gold dust, silver, bullion, or other precious metals, coins, jewelry, bills of any bank or public body, diamonds or other precious stones, shall lade the same on board of any ship or vessel, without at the time of such lading, giving to the master, agent, owner or owners of the ship or vessel receiving the same, a note in writing of the true character and value thereof, and have the same entered on the bill of lading therefor, the master and owner or owners of the said vessel, shall not be liable, as carriers thereof, in any form or manner. Nor shall any such master or owners be liable for any such valuable goods,

beyond the value and according to the character thereof so notified and entered.

§ 3. *And be it further enacted*, That the liability of the owner or owners of any ship or vessel, for any embezzlement, loss or destruction, by the master, officers, mariners, passengers, or any other person or persons, of any property, goods or merchandise, shipped or put on board of such ship or vessel, or for any loss, damage, or injury by collision, or for any act, matter or thing, loss, damage or forfeiture, done, occasioned or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner or owners respectively, in such ship or vessel, and her freight then pending.

§ 4. *And be it further enacted*, That if any such embezzlement, loss or destruction shall be suffered by several freighters or owners of goods, wares or merchandise, or any property whatever, on the same voyage, and the whole value of the ship or vessel, and her freight for the voyage, shall not be sufficient to make compensation to each of them, they shall receive compensation from the owner or owners of the ship or vessel, in proportion to their respective losses; and for that purpose the said freighters and owners of the property, and the owner or owners of the ship or vessel, or any of them, may take the appropriate proceedings in any court, for the purpose of apportioning the sum for which the owner or owners of the ship or vessel may be liable amongst the parties entitled thereto. And it shall be deemed a sufficient compliance with the requirements of this act, on the part of such owner or owners, if he or they shall transfer his or their interest in such vessel and freight, for the benefit of such claimants, to a trustee, to be appointed by any court of competent jurisdiction, to act as such trustee for the person or persons who may prove to be legally entitled thereto, from and after which transfer, all claims and proceedings against the owner or owners shall cease.

§ 5. *Be it further enacted*, That the charterer or charterers of any ship or vessel, in case he or they shall man, victual and navigate such vessel at his or their own expense, or by his or their own procurement, shall be deemed the owner or owners of such vessel within the meaning of this act; and such ship or vessel, when so chartered, shall be liable in the same manner as if navigated by the owner or owners thereof.

§ 6. *And be it further enacted*, That nothing in the preceding sections shall be construed to take away or effect the remedy to which any party may be entitled, against the master, officers or mariners for or on account of any embezzlement, injury, loss or destruction of goods, wares, merchandise or other property, put on board any ship or vessel,

or on account of any negligence, fraud or other malversation of such master, officers or mariners, respectively, nor shall anything herein contained lessen or take away any responsibility to which any master or mariner of any ship or vessel may now by law be liable, notwithstanding such master or mariner may be an owner or part owner of the ship or vessel.

§ 7. *And be it further enacted*, That any person or persons shipping oil of vitriol, unslacked lime, inflammable matches or gunpowder, in a ship or vessel taking cargo for divers persons on freight, without delivering, at the time of shipment, a note in writing, expressing the nature and character of such merchandise, to the master, mate, officer or person in charge of the lading of the ship or vessel, shall forfeit to the United States one thousand dollars.

This act shall not apply to the owner or owners of any canal boat, barge or lighter, or to any vessel of any description whatsoever, used in rivers or inland navigation.

Approved March 3, 1851.

INDEX.

THE REFERENCES ARE TO THE PAGES.

A.

PAGE.

ABATEMENT, plea of, ... 555, 556, 560, 561
when it may be pleaded by carrier, ... 560, 561
ACCEPTANCE of property, ... 519
no waiver of damages, ... 129, 332, 333
discharges carrier, when, ... 518, 519
ACCESSORIAL THINGS accrue to the holder of the title, 41, 324, 325
considered in relation to deposits, ... 74 – 82
the proceeds of property enure to the owner, ... 241
in pledges, ... 222, 239, 241
in contracts of hire, ... 324, 240
ACCIDENT, inevitable, what is, ... 168, 455, 456, 601, 602
not always an act of God, ... 455, 456
ACTS OF CONVERSION, ... 87, 114, 132, 260
ACT OF GOD, what considered such, ... 168, 170, 454 – 462
no bailee answerable for, ... 168, 169, 454
what are not acts of God, ... 455, 456
ACTIONS by bailors, ... 109, 110, 116, 143, 314
against them, ... 116, 117, 552 – 577
forms and nature of, ... 116, 132, 314, 552 – 577
ADVERSE CLAIMANTS, see bill of interpleader, ... 84, 85
AGENTS and factors, ... 117, 119, 214 – 218, 220, 280 – 283
AGISTERS, duties of, ... 278
ANALOGY between debtor and borrower, ... 181 – 183
ATTORNEY, action for services as, ... 367, 368
answerable for neglect, ... 368, 369
AUTHORITY, when and how revoked, ... 119 – 128
when not revocable, ... 156, 157
AVERAGE, general, what, ... 509, 510
what included in, ... 509, 510

B.

PAGE.
BAILEE FOR HIRE, duties of, ... 312–314
BAILEE, cannot dispute bailor's title, ... 288, 289, 305, 306, 535
BAILEE'S RIGHT OF PROPERTY, ... 353–356
BAILOR'S RIGHT OF PROPERTY, ... 340–353
BAILMENT, the general subject, definitions, ... 33, 34
classes of, ... 35– 47
deposits to be kept gratuitously, ... 35, 47
mandates or gratuitous commissions, ... 35, 36, 94
commodatum or gratuitous loans, ... 36, 137
pawns or pledges, ... 37, 188
hiring of custody, of labor and services, of carriage, for use, 37, 274
degrees and grounds of liability in, ... 40– 43
BAGGAGE, of passengers, ... 427, 428, 433, 550–552, 580, 581
of guests in an inn, ... 402–408
received for carriage, notice, ... 433, 484–490
proof of loss of, ... 304, 305, 422–423
BANK, receiving note for collection, duty of, ... 111, 112, 113
BANK, ordinary deposits in, not a bailment, ... 66
special deposits in, are when, ... 66– 74
liability for, ... 66– 74
BANK DIRECTORS, their liability, ... 113, 114
BANKRUPTCY, effect of on contract of bailment, ... 119–122, 128
BARGEMEN, common carriers, ... 440, 441
BILL OF LADING, its form and character, ... 490–502, 543, 544
as a receipt and as a contract, ... 490–502
BORROWER, his contract, ... 36, 37– 41
his possessory interest, ... 142–145
his use of the thing borrowed, ... 147–151
the loan to him is a personal trust, ... 158, 159
effect of fraud on his part, ... 160–162
to bear the expenses, ... 163
care demanded of, ... 164
when exempt from liability, ... 166–173
as to valued loans, ... 173
must assume burden of proof, ... 175, 176
bound to restore the thing borrowed, ... 177–186
acquires title when, ... 186, 187
BURDEN OF PROOF, on innkeepers when, ... 402–405, 407
in deposits, ... 69, 71, 87– 89
in mandates, ... 128–131
in loans, ... 175–176
in pledges, ... 227–262
under contracts for hire, ... 304–306, 320–323
under contracts for carriage of goods, ... 454–490, 565–570
by commom carrier, ... 490–513, 565

PAGE.

BURDEN OF PROOF (Continued).
under notices, ... 469 – 490
under bill of lading, ... 490 – 502
under contracts for carriage of passengers, ... 581, 583 – 618

C.

CANALS, freezing of, an act of God, ... 457, 458
CANAL BOATMEN are common carriers, when, ... 441
CAPTORS, rights and duties of, ... 463, 464
CAPTURE, loss by, ... 463, 496, 497
CARTMEN are not common carriers, ... 428 – 430
CARRIAGES, carrier to provide safe, ... 467, 468
CARRIERS who are not common, duties of, ... 567, 568
CARE AND DILIGENCE, degrees of, required, ... 38, 39 – 43, 73, 74
102 – 108, 164 – 166, 371 – 375, 454 – 468, 583 – 594
CASUALTY, inevitable, what, ... 454 – 458
CHATTEL MORTGAGES, when mortgagee's interest may be sold on execution, ... 209, 210
CHOSES IN ACTION, may be pledged, how, ...189, 197, 198, 251, 252
cannot be sold on execution, ... 209, 210
CHARACTER OF BAILEE, when material, ... 140, 141
CHARTERER, when considered owner, ... 439, 549, 550
CIVIL LAW, flexibility of, ... 279
CLEAN BILL OF LADING, what is, ... 510
COACHMEN, when common carriers, ... 430 – 435
COFFEE HOUSE, an inn, when, ... 391, 392
COLLISION of ships, a peril of the sea, ... 496
effect of, when inevitable, ... 496 – 498
COMMODATUM, contract of, ... 36
COMMON CARRIERS, who are such, ... 425 – 443
all are such who are engaged in the business, ... 425 – 428
wagoners, when, ... 430 – 432
coach proprietors, when, ... 432 – 434
cartmen not common carriers, ... 429, 430
drivers of coaches, when, ... 434, 435
masters of vessels, ... 435 – 437
owners of vessels and boats, ... 437 – 443
a general ship, when, ... 438 – 440
the charterer for the season, ... 439, 549, 550
wharfingers, bargemen and ferrymen, when, ... 440, 441
railroad companies, ... 443, 515 – 518, 519, 520
all who enter upon the business as such, ... 303, 441
their duty to receive for carriage, ... 443 – 446
delivery to carriers, ... 446 – 454
their responsibility, ... 454 – 468

PAGE.

COMMON CARRIERS (Continued).
public notices, ... 469 – 490
special contracts by, ... 468 – 490
their contract expressed in bill of lading, ... 490 – 503
duties in the carriage of goods, ... 503 – 513
delivery by the carrier, ... 513 – 540
his hire or reward, ... 540 – 547
his lien, ... 547 – 552
the carrier cannot dispute his employer's title, ... 535, 539
the carrier's duty to deliver by custom, ... 531 – 535
remedy against him, ... 552 – 577
in the nature of case, ... 555 – 559
on the contract, ... 559 – 561
parties to the action, ... 561 – 565
must bear the burden of proof, ... 565 – 570
damages recoverable against him, ... 570 – 572
duties when and how qualified, exceptional cases, 515, 518, 572 – 577
CONCEALMENT and fraud, effect of, ... 160 – 162
CONDITIONAL agreements, how invalidated, ... 199, 247
CONFUSION, when a change of title, ... 81, 82, 74 – 82
CONSIDERATION, every contract must have, ... 58, 59
CONSIGNEE, when bound to accept consignments, ... 304
CONSIGNOR AND CONSIGNEE, ... 500, 502, 561, 563
who, to bring action for goods, ... 561 – 565
the owner must sue, ... 561 – 565
CONTRACTS FOR HIRE, see hire, contracts of, ... 37, 38, 274 – 276
CONTRACTS, in deposits, mandates, ... 108 – 115
conditional, when, ... 199, 200
special, by common carrier, ... 468 – 490
how construed, ... 474, 475 – 482, 490 – 498
CONVERSION, ... 55, 91, 92, 114, 129, 130, 226, 287, 291
an act of, does not change title, ... 132, 133
COUNTERMAND of authority, ... 119 – 128, 156 – 158, 185
COUNSELOR, action for services as, ... 167, 168
CREDITORS, assignments for benefit of, ... 136
CUSTOM, when appealed to, to explain contract, ... 289, 510, 512
or the mode of delivery, ... 286, 508, 509, 515, 531 – 534
CUSTODY, duty in regard to, ... 276 – 296
duty of, for hire, ... 223 – 237, 277 – 296
DAMAGES, rule and measure of, against carriers, ... 570 – 572
against other bailees, ... 290
DANGERS OF THE SEAS, &c., what are, ... 491 – 498
DANGERS, of navigation, ... 491 – 498
DEATH, or injury of passengers, presumptions from, ... 588, 589
effect of, on contracts, ... 119 – 128

PAGE.
DEBT, USURIOUS, payment of, mortgage and pledge to secure, 244–247, 263, 264
DECK GOODS received, to be carried on deck, ... 451, 513
DEGREES of diligence and care, how measured, ... 38, 39–43
DECLARATION or complaint, necessary allegations, 133, 134, 322, 552–557
DELAY, when necessary, ... 523–526
DELIVERY of goods, to a carrier, ... 299, 300, 446–454
by a carrier to subsequent carrier, ... 528–534
by a carrier, ... 303, 513–540, 549
must be made by him, ... 513–515
by other bailees, ... 220, 287
to an innkeeper, ... 398–402
DELIVERY, by depositary, ... 83–89
by borrower, ... 139, 157, 164, 177–186
by mandatary, ... 105, 106
by pledgee, ... 219, 220
for a special purpose, ... 226, 227
by innkeepers, ... 413
by hirers for a term, ... 333–335, 357, 374, 380, 381
when symbolical, ... 219, 220
DEMAND and refusal, effect of, ... 87, 89, 92
DEPOSITS, what, ... 47, 48, 66–74
special, ... 66–74
parties to the contract, ... 49–55
in the hands of the finder, ... 55–57
in the hands of sheriffs and receiptors, ... 59–63
general and special property in, ... 64–66
special, in banks and others, duties and liabilities in respect to, ... 66–74
right of accession in respect to, ... 74–83
a second bailment of, ... 83
redelivery of things deposited, ... 83–89
right to use, ... 89–93
consideration of contract, ... 58, 59
DEPOSITUM, what, ... 35
DEPOSITARY, his rights and duties, ... 60, 61, 64, 67, 74
DESTRUCTION of thing bailed, effect of, ... 356, 357, 381
DEVIATION, from contract, ... 328, 329, 362–366, 383, 384, 385, 504
from voyage or journey, ... 329, 460, 461, 504
DILIGENCE, degrees of, ... 35–45
degree required in deposits, without reward, ... 66–74
in deposits for hire, ... 276–296
in cases of finding, ... 55
in gratuitous loans, ... 164–166
in mandates, ... 102–108
in pledges or pawns, ... 223–237

PAGE.

DILIGENCE (Continued).
in contracts of hire, ... 276 – 296, 371 – 375
of the common carrier, ... 454 – 575
of innkeepers, ... 402 – 408, 414
DETINUE, the old action of, ... 157, 158, 185, 186
DETERMINATION of contract of hire, ... 331 – 338
DISSOLUTION OF CONTRACTS, of mandate, ... 119 – 128
of loans, ... 177 – 186
of deposits, ... 84 – 89
of contracts for hire, ... 331 – 338, 356, 357, 381

E.

ENEMIES, public, who are such, ... 463 – 468
ENTERTAINMENT, at an inn, what is, ... 397
ESTOPPEL, doctrine of, when it applies, ... 62, 63, 295, 305, 306, 535
EVIDENCE, (see burden of proof;) of loss, ... 455, 496, 498, 527
EXCEPTIONAL CASES, of carriage of property, ... 572 – 577
EXECUTION, pledges not liable to at common law, ... 204 – 208
how far liable by statute, ... 205
in executions against bailees, ... 207, 208
EXEMPTION FROM LIABILITY, borrower when exempt, ... 166 – 173
EXPENSES, by whom borne, ... 163
by whom in loans (gratuitous), ... 163, 164
by whom in contracts of hire, ... 312, 313, 326 – 338
by whom in mandates, ... 112, 113
by whom in pledges or pawns, ... 237 – 239
EXECUTORS AND ADMINISTRATORS, rights of, ... 202, 203
EXECUTORY AND EXECUTED CONTRACTS, distinction between, 311
EXECUTION, sale of pledge under statute, ... 204 – 210
sale of pledgee's interest, ... 209, 210, 254 – 256

F.

FACTORS, their duties and rights, ... 34, 118, 119, 214 – 218, 280 – 283
under statute ..... 114 – 118
right to sell, ... 220, 221, 280 – 283
FEASANCE AND NON-FEASANCE, ... 97, 101, 379, 380
FEMES COVERT, not capable of contracting, ... 49, 50, 243
rights as to separate estate, ... 243
FERRYMEN, when liable as common carriers, ... 440, 441
and how far as passenger carriers, ... 441
FILING chattel mortgages, effect of, ... 219, 220
FINDER, not bound to take up property, ... 55
must take care of it if he does, ... 55, 56, 57
has a right to defend his possession, ... 55, 57
his right of reward, ... 56

PAGE.

FINDER (Continued).
when liable for theft in appropriating, ... 162
FIRE, who liable for losses by, ... 169 – 171, 288, 462
common carriers are, ... 455, 456, 462
other bailees are not, unless, ... 169 – 171, 288
FORCE, losses by irresistible, ... 169 – 172, 455 – 462, 463 – 468
FORECLOSURE, in pledges and mortgages, ... 248 – 255, 259
FORFEITURE, by non-payment of chattel mortgage, 249, 253, 254, 264
FORWARDING MERCHANTS, who are 293
duty of carrier to forward, ... 449, 450
and their liabilities, ... 293, 294, 302
FRAUD, gross negligence, ... 70, 71 – 73
vitiates all contracts, ... 160, 162
in loans, ... 160 – 162
in sales, effect of, ... 92, 93, 160, 162
FREIGHT, when due, ... 540 – 547
lien for, ... 547 – 552
FULFILLMENT of contract for hire, ... 380 – 387

G.

GARNISHMENT and interpleader, ... 84, 85
GENERAL LIENS, not favored, ... 548
GRATUITOUS LOANS, what are, ... 137
elements of the contract, ... 137 – 142
interest of the borrower, ... 142 – 145
parties capable of contracting, ... 145 – 147
loan, how used, ... 147 – 151
lender's interest in loan, ... 151 – 158
the loan a personal trust, ... 158
fraud in procuring loan, ... 160 – 162
expenses, by whom borne, ... 163
care required of the borrower, ... 164
when exempted from liability, ... 166 – 173
valued loans, ... 173
burden of proof, ... 175, 176
restitution of loan, ... 177 – 186
time and place of the return, ... 177, 180
right of countermand, ... 185
change of title by recovery, ... 187
GRATUITOUS BAILEE, duties, ... 67 – 74
GROSS NEGLIGENCE, what is, ... 44, 45, 67 – 74
and its relation to fraud, ... 67 – 74, 136
GUARDIAN, right to demand property, ... 85, 86, 87, 329
GUESTS, who are, at an inn, ... 393 – 397
rights of, ... 402 – 408, 408 – 410

H.

PAGE.
HACKNEY COACHMEN, liable as common carrier, ... 434
and as passenger carriers, ... 434, 435
HIRE, contracts of, ... 37, 38, 274 – 276
classes of contracts for hire, ... 275
of deposit, and custody, ... 276 – 296
agistment, ... 278
the bailee answerable for ordinary neglect, ... 276, 278
as warehouse-men, ... 284 – 296
as wharfingers, ... 297 – 304
as forwarding and commission merchants, ... 304
lien in these cases, ... 307 – 309
evidence of loss, ... 305 – 306
HIRE, of things, ... 309 – 338
the hirer has a possessory interest, ... 309, 310
distinction between executory and executed contracts, ... 311
obligations of letter to hire, ... 311, 312
engagements of the hirer, ... 312, 313
by an infant, ... 313
contract for a term, ... 314
liability in respect to servants, ... 315 – 320
burden of proof under contract for hire, ... 320 – 323
right of accession in, ... 324, 325
use of thing hired, ... 326 – 331
termination of contract, ... 331 – 338
mode and place of return, ... 333 – 335
distinction of thing bailed, effect of, ... 335, 336
HIRE OF LABOR AND SERVICES, ... 338 – 387
includes what, ... 338
nature of contract, ... 339, 340
bailor's right of property, ... 340 – 353
case of shipbuilding, ... 344 – 346
statute of frauds does not apply, ... 347, 348
bailee's right of property, ... 353, 356
his lien, when it commences, ... 354
its nature and extent, ... 355
loss by whom borne, ... 356 – 358
HIRE OF LABOR AND SERVICES GENERALLY, ... 358 – 370
the workman has no pay where he does no valuable service, ... 358, 359
case of a surveyor, ... 359
must perform strictly, ... 359
infant may rescind his contract, effect of, ... 360
performance a condition precedent to a recovery, ... 360
completion after time agreed on, effect of, ... 361

PAGE.
HIRE OF LABOR AND SERVICES GENERALLY (Continued).
harsh and abusive language, ... 361, 362
action for repairs under special agreement,..... 362, 363
deviation from terms of agreement,..... 363
effect of a mistake of fact on terms,..... 363, 364
agreement for compensation by will,..... 364
when no promise to pay for services implied,..... 364, 365
delivery of an article made to order,..... 365
effect of delay caused by employer,..... 365, 366
waiving contract—*quantum meruit*,..... 365, 366, 367
using better materials than required, ... 366
services as a counselor at law,..... 367, 368
services as an attorney, recovery for when,..... 368, 369
must show retainer; voluntary services,..... 369, 370
CARE DEMANDED, ... 371 – 375
ordinary care is required to guard and preserve,..... 371, 372
bound to answer for his servants,..... 372
right of compensation; how measured,..... 373
bailor to show negligence; losses by decay, &c., ... 374, 375
DEGREE OF SKILL REQUIRED, ... 375 – 380
implied engagement for skill and its use,..... 375, 376
skill how measured; professional skill,..... 376, 377, 379
non-feasance, action for,..... 377 – 380
FULFILLMENT OF CONTRACT,..... 380 – 385
when contract of bailment for hire fulfilled,..... 380, 381
risk of loss; total destruction, effect of,..... 381
special contract for reward for services,..... 382, 383
reduction of damages, when and how made,..... 383, 384
terms of contract to be fulfilled, deviation, delay,..... 384, 385
LIEN for labor and services,..... 386, 387
HIRE OF CARRIAGE, by common carriers, ... 40, 43, 424
nature of subject,..... 424, 425
WHO ARE COMMON CARRIERS, definition, ... 425, 426
those who carry for all persons for hire are such,..... 425
must carry for hire and as a business to be such,..... 426, 427
when engaged in the business, delivery to agent, effect of,... 427
passenger carriers are common carriers of baggage,.... 427, 428
distinction between them,..... 428
Kent's definition of common carriers,..... 428
steamboats towing other boats not common carriers,..... 428
cartmen are not common carriers,..... 429
per contra, a case; reason of the rule,..... 429, 430
the wagoner is a common carrier, when,..... 430, 432
proprietors of stage-coaches are, when and how far,..... 432
are common carriers of baggage,..... 433

PAGE.

HIRE OF CARRIAGE.

WHO ARE COMMON CARRIERS (Continued).

connot evade their liability as such by notice,..... 433
when common carriers of money,..... 434, 435
carriers of passengers not liable as common carriers,..... 434
masters of vessels are common carriers,..... 435 – 437
they are liable on their contract,..... 435, 436
are liable to same extent, but not jointly with owners,.. 436, 437
owners of vessels are common carriers,..... 437 – 443
charterer, when considered owner,..... 550
are such at sea and on inland waters,..... 437
their employment determines whether carriers or not,.. 438, 439
liable as such when employed as common carrier, ... 438
master's authority, how implied, ... 439
this implication is repelled, when,..... 440
a general ship, what,..... 440, 441
nature of business determines who are carriers,..... 441
form of action not material, ... 442
contracts to carry, as common carriers, ... 442, 443

DUTY OF CARRIER, TO RECEIVE, ... 443, 446
bound to accept goods for carriage, when, ... 443
not in an unusual manner, ... 444
having room, bound to receive and carry,..... 444, 445
the rule is the same as to passenger carriers,..... 445, 446

DELIVERY TO THE CARRIER, what is,..... 446 – 454
to charge the carrier, there must be a delivery to him, . 446 – 451
his liability begins from the delivery, ... 447
delivery on wharf, how made, ... 447, 448
the act of loading is the carrier's act, ... 447
delivery to him as a forwarding merchant,..... 449
he becomes a forwarder when, booking goods, ... 449, 450
the manner not material, if carrier receive the goods,..... 450
neither is the time material,..... 450, 451
receiving goods, to carry in particular manner, effect of, ... 451
the delivery must be fairly made into carriers custody, . 452, 453
delivery on the dock must be with notice, ... 453

RESPONSIBILITY OF COMMON CARRIERS, ... 454
by general custom; grounds of liability,..... 454
exceptions; act of God, what, ... 454
inevitable accident, not same thing,..... 455
the carrier is answerable for accidents,..... 455, 456
for mistake of fact, and every loss except, &c., ... 456
the rule stated affirmatively, and illustrated by cases, .. 456 – 458
a loss not attributable to act of God, when,..... 458, 459
the act of God affects carrier, how far; loses freight,... 459, 460

PAGE.

HIRE OF CARRIAGE.

RESPONSIBILITY OF COMMON CARRIERS (Continued).
loss in a deviation from route prescribed, who to bear, . 460, 461
special contracts prevail over usage, when, ... 461
acts of God, perils of the sea, and inevitable accidents, are not the same, ... 461, 462
how far liable after an act of God, ... 462
the question of liability, how resolved, ... 462
fires kindled by lightning, acts of God, others not, ... 462
PUBLIC ENEMIES, losses by, ... 463
who are public enemies, ... 463, 464
rioters and robbers are not; pirates are, ... 463
property captured, title how changed, ... 463, 464
but the carrier, to excuse himself, need not show change of title, ... 464
must answer for goods with the exceptions named, ... 465
regarded as an insurer, ... 465
his employment public, and his duty declared by law, .. 466, 467
his implied contract to provide safe carriages, ... 467, 468
SPECIAL CONTRACTS, ... 468–490
right to make special contracts, bills of lading, ... 468, 469
being bound to accept, cannot impose terms, ... 469
PUBLIC NOTICES, ... 469–490
effect of, in cases of concealment and fraud, ... 470–472
when contents of packages to be disclosed, ... 472
notices, entering into the agreement, ... 472–474
nature and construction of notices, ... 474, 475
course of English decisions on the subject, ... 475–482
results in a statute, the carrier's act, ... 480, 481
duties and decisions under it, ... 482, 483
notices annulled by it, never favored, ... 484
the doctrine as to notices in this country, ... 484, 485
not to be deemed part of the contract, ... 485, 487
no contract implied, conformable to terms of notice, ... 488–490
BILL OF LADING, form of, ... 490
a contract and a receipt, ... 490
change in the form of the exception, ... 491
no exception formerly made, ... 491
exceptions in the bill, how construed, ... 492–495
the perils of the sea cover unavoidable misfortunes, ... 496
and losses by capture and collision, ... 496, 497
construction of "perils of the sea" under insurance policies, ... 497, 498
master's right to sell cargo, ... 499
right of consignor over, ... 500

PAGE.

HIRE OF CARRIAGE.

BILL OF LADING (Continued).
right of consignee receiving it for advances, ... 500
freight by whom paid,..... 501, 502
CARRIAGE OF GOODS, manner of, ... 503, 504
when carrier's duty begins and ends, ... 505 – 508
usage as to mode of delivery,..... 508, 509
jettison and general average,..... 509 – 512
loss of goods improperly laded, by act of God,..... 513
DELIVERY BY THE CARRIER,..... 513 – 539
cannot be committed to another,..... 514
warehousing, usage of trade, ... 515, 516
mode of delivery by ships and railroads, ... 515 – 518
railroads, when depositaries, ... 516 – 518
constructive delivery, or waiver of, ... 519
delay of delivery, railroad act,..... 519, 520
special agreement to deliver safely, ... 521
time, place and manner of delivery,..... 521, 522, 527
carrier must find consgnee; duty if he cannot,..... 521, 522
duty if consignee refuse to receive,..... 522, 523
reasonable delay, cases,..... 523 – 525
cargo of specie, how delivered; low water,..... 526
usage as to mode of delivery to be proved,..... 526
duty after injury by act of God, ... 527
storing or forwarding at end of route,..... 527, 528
delivery to succeeding carrier,..... 529 – 531
delivery from vessels arriving from foreign ports, custom, 531 – 534
carrier not to dispute his employer's title,..... 535, 539
right of stoppage *in transitu*,..... 535, 539
CARRIER'S HIRE OR REWARD,..... 540 – 547
right to demand prepayment,..... 541
who bound to pay freight,..... 542 – 544
pro rata freight, when due,..... 545 – 547
CARRIER'S LIEN, specific and favored,..... 547, 548
when waived, ... 548 – 551
REMEDIES AGAINST THE CARRIER,..... 552 – 577
for not receiving goods offered, ... 552, 553
remedy in admiralty,..... 553
usual remedy on contract and for tort,..... 554, 555
ACTION ON THE CASE, ... 555 – 559
convenience of this action, ... 557
ACTION ON THE CONTRACT, ... 559, 561
convenience of, pleadings in,..... 560, 561
PARTIES TO THE ACTION, ... 561 – 565
the owner brings the action,..... 561, 564

PAGE.

HIRE OF CARRIAGE.
PARTIES TO THE ACTION (Continued).
consignee presumed the owner, ... 562, 563
who liable for freight, ... 562, 564
BURDEN OF PROOF, ... 565 - 570
the pleadings show where it lies, ... 565
negative proof, presumptuous, ... 566, 567
under special acceptances, statutes, ... 568 - 570
DAMAGES, how estimated, ... 570 - 572
EXCEPTIONAL CASES, ... 572 - 577
English railway cases, ... 572, 573
carriage of live stock, slaves, &c., ... 572 - 574
railroads common carriers by statute, ... 575
HIRE OF CARRIAGE OF PASSENGERS, ... 577
common carriers of passengers bound to receive and carry, 577 - 580
right to make regulations and preserve order, ... 578, 579
PAYMENT OF FARE, ... 580 - 583
right to prepayment; fare covers baggage, ... 580, 581
railroads bound to check baggage; tickets, nature of, ... 581, 582
putting off passengers not paying fare; lien, ... 582
right to freight from owner when he is not the bailor, ... 582, 583
GENERAL LIABILITY, rule of, ... 583 - 586
passenger carriers bound for utmost care, ... 583, 585
COACHES TO BE ROAD-WORTHY, ... 586 - 591
railroad companies bound by same rule, ... 587 - 590
COMPETENT SKILL, agreement for, ... 591 - 594
and for its exercise, ... 591, 592
a partnership, what, ... 593, 594
LAW OF THE ROAD, ... 594 - 599
by statute, ... 595
by custom; in cities and villages, ... 596 - 599
DUTIES BY THE WAY, ... 600 - 602
to stop at usual places, ... 600
disorderly persons, notice of danger, ... 601, 602
PASSENGER CARRIERS BY WATER, duties of, ... 602 - 618
overloading; explosions of steam, ... 603
to carry lights, when, ... 604 - 608
rules of navigation, usages of the sea, ... 609 - 612
liability in cases of collision, ... 614
statutes and penalties, ... 615 - 618
HIRER, duties of, ... 311, 312
HOTELS are common inns, ... 391, 401, 402
HOYMEN, when common carriers, ... 440 - 446

I.

PAGE.

ICE, stoppage in consequence of, *vis major*, ... 457
on rivers, ... 457, 458
on canals; frost not, when, ... 458
ILLEGALITY of contracts, ... 244, 247, 263, 264, 390
for tavern expenses, ... 393
in other contracts, ... 244–247, 263, 264, 390, 393
IMPLIED CONTRACTS, nature and ground of, ... 48, 49, 364, 365
INCREASE of flocks and herds, ... 41, 240, 241, 324, 325
civil fruits, to whom they belong, ... 340, 241
to the usufructuary, when, ... 240, 241
to the owner, when, ... 239–242
INCORPOREAL PROPERTY, how pledged, ... 203, 204
INDEMNITY, effect and extent of, in contract of mandate, ... 121–123
in contracts of pledge, ... 237
INEVITABLE ACCIDENT, what, ... 168, 170, 454–462
not same as act of God, ... 454–462, 468
INFANTS, capable of contracting, ... 50, 51
right to recover for work done, ... 360
liable for torts, not on contracts, ... 50, 51
INNKEEPERS, who are such, ... 388–393
the business of innkeeping not a franchise, ... 388
the right to retail spirituous liquors is, ... 388
chartered rights of villages and cities, ... 389
are not vested rights against the state, ... 389
the towns have the same rights, ... 389
the excise law not mere revenue act, ... 390
a penalty implies prohibition, when, ... 390
inns and taverns are the same, ... 391
an hotel is an inn, ... 391
innkeepers liable as such though not licensed, ... 392
the license is a personal trust, ... 392, 393
disqualifications by statute, ... 393, 417–419
GUESTS, who are deemed such, ... 393–397
all persons entertained as such are guests, ... 393
a guest, leaving his horses at an inn, remains a guest, ... 394
one hiring lodgings for a time, not a guest, ... 394
inns established for travelers, ... 394, 395
who may be a guest, ... 395
case of sending or leaving horse and carriage at an in, ... 396
what constitutes one a guest, ... 397
WHAT A DELIVERY TO AN INNKEEPER, ... 398–402
special delivery not necessary, ... 398, 399
goods deposited by request of guest, in particular room, effect of, 398
money not delivered, ... 399

PAGE.

INNKEEPERS.

WHAT A DELIVERY TO AN INNKEEPER (Continued.)
delivering to the guest the key of his room, effect of,..... 399
the delivery must be into innkeeper's custody,..... 399, 400
must be deposited as directed by innkeeper,..... 400
hotels, recent statute relative to; its construction,..... 401, 402
RESPONSIBILITY OF INNKEEPERS,..... 402–408
general rule of liability, its rigor necessary,..... 402, 403, 414
analogy with common carrier,..... 403–405
innkeeper liable for negligence, for theft, &c.,..... 404
may dictate as to mode of receiving goods,..... 405
when not answerable,..... 405
may contract for limited liability,..... 405, 406
not absolutely liable for all losses except, &c.,..... 406, 407
when his liability begins and ends, his lien,..... 407
liable for losses by robbery, &c., when,..... 407, 408
INNKEEPER'S DUTY TO RECEIVE GUESTS,..... 408, 410
bound to receive when he has room,..... 408
may be prosecuted civilly and criminally, for refusal,..... 408
must receive all persons on same terms,..... 409
a tender of reward, when necessary; to be alleged, when,.. 409
indictable as a nuisance, when,..... 410
right to appoint guest his room,..... 410
an inn is open to the public, to what extent,..... 410
INNKEEPER'S LIEN,..... 411–414
has a lien on his guest's good only,..... 411
a traveler deemed a guest, when,..... 411, 412
no lien on goods received from a neighbor,..... 412
effect of giving credit,..... 412, 413
title to the property not material to lien,..... 413
extent of lien; it does not imply a right to sell,..... 413, 414
STATUTE REGULATIONS,..... 414–419
principle of general liability, illustrated,..... 414
the license system, created by statute,..... 415
Revised Statutes; the license,..... 415, 416
history of inns and hotels, parallel, note,..... 417
recent prohibitory statute, substance of,..... 417, 419
WHAT WILL EXCUSE THE INNKEEPER,..... 419–423
neither sickness, nor absence will,..... 419, 420
the custody of goods part of contract,..... 420
innkeeper not answerable when he does not receive,..... 421
effect of special contract,..... 421
the common law applies in all the states,..... 421, 422
the guest a witness for himself, when,..... 422, 423
INSURER, carrier an insurer,..... 465, 466

PAGE
INSURANCE, cases of, against dangers of navigation, 491, 492, 497, 498
INTEREST, nature of, ... 240, 241, 262, 263
not unlawful at common law, ... 262, 263
INTERPLEADER, nature of, ... 84, 85
allegations in, ... 84, 85
IRRESISTIBLE FORCE, when an excuse for bailee, 71 – 73, 168, 170, 454 – 462

J.

JETTISON, when carriers answerable for, ... 510
when excused by necessity, ... 512
how borne by general average, ... 509, 510
goods on deck, effect of, ... 513
JOINT CONTRACTS, how executed and enforced, ... 85, 86, 87, 184
liabilities of bailee under, ... 85 – 87

L.

LABOR AND SERVICES, hire of, ... 338 – 387
LAW OF THE ROAD, ... 594 – 599
LARCENY, when the bailee may be guilty of, ... 161, 162
he is not so guilty as a bailee, ... 161, 162
LENDER, right of revocation of loan, ... 143, 144, 151 – 158
his interest in the subject of the loan, ... 151 – 158
LENT NOTES, how treated, ... 148
LIEN, nature of, ... 195, 210, 307, 308, 309, 386, 411 – 414
not assignable, ... 195, 196, 210, 211
what bailees have a lien, ... 307, 309, 354, 355, 386, 411
the pawnee has a lien, ... 210, 211, 212
the bailee for labor and services, ... 386
the innkeeper, ... 411, 414
the common carrier, ... 547, 552
the warehouse-man and wharfinger, ... 307, 309
the factor, ... 34, 114 – 118, 119, 214 – 218, 280 – 283
how enforced, by pawnee, ... 248 – 262
by other bailees, ... 307, 414, 547 – 552
it is not an interest *in rem*, ... 308, 411, 414, 547, 551
LIABILITY, once incurred remains, ... 289
it is waived when, ... 129, 232, 332, 361, 366, 367, 571, 572
in respect to servants, ... 315 – 320
LICENSE, to sell liquors by retail a franchise, ... 388
LIGHTERMEN, when common carriers, ... 440 – 442
LIGHTNING, an act of God, ... 462
LIGHTS, when to be carried by vessels, ... 603 – 608
LIMITATION OF ACTIONS, statute of, ... 268 – 270

PAGE.
LIMITATION of responsibility by common carriers, 468, 469, 480 – 490, 502, 575
by special contract, ... 468, 469, 488 – 490
by public notices, ... 469 – 488, 488 – 490
extent of the limitation, ... 474 – 484, 488
cannot be made by a mere notice, ... 485 – 490
it must be by special contract, ... 488 – 490
LIVE STOCK, carriage of, ... 572 – 576
LOANS, gratuitous, ... 137
elements of contract, ... 137 – 142
the borrower's interest in, ... 142 – 145
parties to the contract, ... 145 – 147
the loan, how used, ... 147 – 151
how used, where nothing is said on the subject, ... 149
the lender's interest in, ... 151 – 158
the loan a personal trust, ... 158, 159
fraud in procuring loan, ... 160 – 162
expense of, how borne, ... 163
care exacted of the borrower, ... 164, 165
borrower, when exempt from liability, ... 166 – 173
valued loans, ... 173, 174
burden of proof, ... 175, 176
restitution, ... 177 – 186
transfer of title by recovery, ... 187
LOCATIO OPERIS, contract of, ... 37
LOSS OF PAPERS, how shown, ... 305
LOSS, effect of showing, on burden of proof, ... 87 – 89, 304, 306, 320 – 323
by whom borne, ... 156 – 158
cause of, proximate cause, ... 455, 496, 498, 527
LUNATIC, how far liable for positive injuries, ... 54, 55

M.

MANDATARY, his character, ... 95
contract to become a mandatary, ... 94
is answerable for misfeasance, ... 98
not answerable for non-feasance, ... 99
nor on a promise to become a mandatary, ... 99
is liable for losses by his gross neglect, ... 102 – 108
must act prudently, ... 102, 103
his care must be such as circumstances require, ... 104
and must have respect to the thing bailed, ... 105
he must deliver goods received for carriage, ... 105
ground of his obligation; effect of non-delivery, ... 105 – 107

PAGE.

MANDATARY (Continued).
must act honestly and with prudence,..... 107, 108
he enters into a contract, ... 108 – 110
remedies against him, ... 108 – 111
duty of a bank receiving a note for collection, ... 112, 113
this is not a contract of mandate with us, ... 113
bank directors, their duties, ... 113, 114
one who volunteers to become a mandatary or bailee, his duty,..... 114, 115
remedies on contract of mandate, ... 115 – 117
burden of proof in actions on contract, ... 128 – 131
a factor is not a mandatary; his duties, ... 117 – 119
the contract of the mandatary, how determined, ... 119 – 128
how affected by death,..... 120 – 124
how by marriage, by insanity, by bankruptcy, ... 126 – 128
MANDATE, contract of, ... 94 – 136
subject of the contract,..... 95, 96
under Code of Louisiana, ... 96, 97
when contract may be enforced,..... 97 – 101
diligence required by,..... 102 – 108
nature of, and remedies under,..... 108 – 115 – 117
contract, how determined, ... 119 – 128
burden of proof, ... 128 – 131
change of title by recovery, forms, ... 131 – 136
MANDATOR, who is, ... 95
his right of action, in case, in assumpsit, ... 108 – 111, 117
his remedies,..... 115 – 117
his death, effect of on contract, ... 121 – 123
it revokes the mandate,..... 121, 125
and puts an end to a power to contract,..... 125
a sale by him, effect of, ... 126, 127
his right of revocation, ... 127
must prove his cause of action, as alleged, ... 128, 129
how this may be done, ... 130, 131
his title transferred by recovery, when, ... 131, 133
forms of action under code,..... 133
MANDATUM, what, ... 35
MARRIAGE, effect of on contract of bailment,..... 126, 127
MARRIED WOMEN, not capable of contracting,..... 49, 50
their rights as to a separate estate, ... 243
as bailees and bailors, ... 49, 50
MASTERS OF VESSELS, are common carriers,..... 435 – 437
they are liable on their contract,..... 435, 436
not liable jointly with owners,..... 436, 437
their authority, how implied, ... 439, 440

PAGE.
MEASURE OF DAMAGES, on demands payable in specific articles, 290,
in suits against carriers, ... 570 – 572
MINORS, not capable of making contracts, ... 50, 51, 360
but are liable for torts, ... 50, 51
MERGER, doctrine of, ... 271, 272
MISFEASANCE, what is, ... 97, 98
distinction between misfeasence and non-feasance, ... 97 – 99
MISTAKE OF FACT, effect of on contract, ... 363
MISUSER, a conversion, ... 91, 92, 114, 320 – 323, 328, 329
MONEY, carriers of without hire, ... 129, 425, 434, 435, 470
common carriers of, ... 434, 435, 470, 479 – 483, 494, 495
when to answer for it as such, 442, 443, 470, 472, 479 – 483, 494
MORTGAGE, of chattels, what is such, 189, 191, 201, 209, 210, 250 – 255
how it differs from a pledge, ... 189 – 191, 201, 250 – 255
it is a conditional transfer of the title, .. 191, 192, 201, 250 – 255
filing, effect of, ... 219, 220, 258, 259
how foreclosed, sale and notice of, ... 250 – 255, 259, 260
mortgaged goods sold on execution, when, ... 209 – 216
the title perfect at law after forfeiture, ... 191, 201, 209
right of redemption under it, ... 253, 254
MUTUUM, contract of under civil law, ... 137, 186, 204
transfers the title, ... 137, 186, 204

N.

NAVIGATION, persons engaged in common carriers when, ... 435 442
rules of sailing, carrying lights, ... 603 – 618
care and skill required, ... 602 – 618
NECESSITY, jettison excused by, ... 509 – 512
NECESSARY DEPOSIT, ... 47, 55 – 57, 59 – 63
NEGLIGENCE, ordinary, what is, ... 44
slight negligence, ... 44
gross negligence, ... 44
when and how far equivalant to fraud, ... 70 – 73
what degree renders bailee liable in, ...
gratuitous deposits, ... 66 – 74, 87, 89
gratuitous commissions, ... 102 – 108
gratuitous loans, ... 138, 139, 164, 165, 166 – 172
pawns or pledges, ... 223 – 237
bailments for hire, 276, 278, 285, 286, 295, 301, 312, 313, 315 – 320, 326 – 331, 371 – 378
NEGOTIABLE PAPER, how transferred, ... 148, 193, 235, 266
wrongfully pledged by bailee, ... 193 – 195
pledge when valid, ... 194, 195
not valid, when pledged for prior debt, ... 193 – 195, 246

PAGE.
NON-DELIVERY, on demand, a conversion, when, ... 87 – 89
by depositary, ... 87 – 89
by mandatary, ... 98, 105, 106, 116, 117, 127, 129, 132
by borrower, ... 147 – 151, 171, 172, 175, 176
by pledgee, ... 198, 200, 204, 212, 213, 250, 260
by hirer, ... 305, 313, 314, 322, 323, 329, 330
by common carrier, ... 442, 513 – 539, 566, 567
by innkeeper, ... 391, 392, 412, 413, 414, 421
NON-FEASANCE, an action for, sustainable when, ... 379, 380
NOTES and bills of exchange, loaned, ... 148, 235, 266
when pledged, ... 193, 194, 245 – 247
NOTICES, by common carrier, ... 469 – 490
use of in detecting fraud, ... 470 – 472, 475 – 482
review of the law in respect to, ... 470 – 490
have been held to raise an implied contract, ... 472 – 474
but do not in this state, ... 484 – 490
no assent to them is to be implied, ... 490
the English statute in respect to, ... 480 – 485
NOTICE to produce papers, when necessary, ... 212
NOTICE OF SALE by pledgee and mortgagee, ... 250 – 255
NUDUM PACTUM, no cause of action, ... 58, 97 – 102, 108 – 111
a consideration always necessary, ... 58, 97 – 101, 108 – 111

O.

ONUS PROBANDI, see burden of proof, 69, 71, 87 – 89, 128 – 131, 175, 227, 262, 320, 402 – 407, 454 – 502
ORDERED GOODS, when the title passes, ... 348 – 353, 340 – 348
ORDINARY DILIGENCE, what is, ... 44, 45, 72 – 74, 102 – 108
estimated with respect to the subject, ... 72 – 74
ORDINARY NEGLECT, what is, ... 44, 127 – 129
it is want of ordinay diligence, ... 66 – 74, 127, 129
OFFICERS, liable as bailees, ... 59, 60
sheriffs and receiptors, ... 59 – 63
deposits by order of court, ... 47, 59, 63
OWNER, when charterer so considered, ... 549, 550
OWNERSHIP, evidence of, ... 119, 132, 220, 246, 247, 464
not to be questioned, when, ... 62, 63, 84 – 87, 193, 535, 539
of goods bailed for hire, ... 193, 202, 274, 340 – 346, 356 – 358

P.

PARTIES TO CONTRACTS, who may be, .. 49 – 55, 145, 146, 242, 243
PARTNERSHIP, what constitutes between stage owners, ... 593, 594
PART-PERFORMANCE, of contract for work, ... 361 – 365
effect of on cause of action, ... 358 – 366

PAGE.
PART-ENJOYMENT, of things borrowed, ... 335 – 338, 380 – 385
of things hired, ... 335 – 338
PASSENGER CARRIERS; see carriers of passengers, ... 577 – 618
how far liable, ... 583 – 586
bound to receive, ... 577 – 580
common carriers of baggage, ... 433, 580
presumptions against, ... 586 – 591
answerable for defects of vehicles used, ... 586 – 591
for fast driving, when, ... 592
for want of skill, ... 591 – 594
and for slight neglect, ... 583 – 586
PAWNS, see pledges, ... 188 – 272
PAWNEE OR PLEDGEE, his interest in thing bailed, ... 201 – 222
has he an interest that may be sold on execution? 255, 256
care required of him, ... 223 – 237
may transfer lien, how, ... 210, 211
does not bear the expenses of pawn, ... 237 – 239
pledges his interest and no more, ... 266 – 268
must account for the fruits of pawn, ... 239 – 243
has the right of sale; mode of, ... 248 – 262
must sell, when, ... 256, 257
must restore pledge, when, ... 262 – 273
must restore income and profits of pledge, ... 268
PAWNOR OR PLEDGOR, his right of property, ... 201 – 222
must bear expenses of pawn, ... 237, 239
his rights of accession, ... 239 – 241
his rights over pledge for usurious debt, ... 244 – 247
his interest may be sold on execution, ... 204 – 208
but not at common law, ... 204 – 206
his right of redemption, ... 248 – 261
right to sell the pledge, ... 225
PAYMENT, in specific articles, when and where made, ... 180 – 185
on demand, when, ... 198
of debt secured by pledge, effect of, ... 212, 213
how applied on several debts, ... 233 – 234
PENALTY, what it implies, ... 390
PERILS OF THE RIVERS AND LAKES, ... 491 – 498
exceptions of, how construed, ... 492 – 498
question of liability, how determined, ... 462, 492 – 498
PERILS OF THE SEA, include what, ... 491 – 498
losses by collision of vessels, ... 496
by piracy, by impressment, ... 463, 491, 492
PHYSICIANS, duties and liabilities of, ... 359, 367
PIGNUS, nature of, ... 37
PILOTS, master and owners answerable for their acts, ... 612, 613

PAGE.
PIRACY, the crime of,..... 463, 491, 492, 494
PIRATES are the enemies of the human race, ... 463, 464
PLACE OF RESTITUTION, by depositary, ... 84 – 89
by mandatary,..... 104 – 106, 114 – 117, 128
by borrower,..... 177 – 185
by pawnee,..... 262 – 273
by bailees for hire,..... 233 – 235
PLEADING, allegations, ... 129, 133, 134, 322, 323, 552 – 577
useful as illustrations of the law,..... 110, 111
PLEDGE, in a general sense, and in a legal sense,..... 189, 190, 191
PLEDGE, contract of,..... 188 – 272
nature of contract, ... 188 – 191
requisites of contract,..... 192 – 200
what property in pledgor and pledgee, ... 201 – 222
care required of pawnee,..... 223 – 227
pledge of cargo by delivery of bill of lading,..... 218 – 220
expenses, by whom borne, ... 237 – 239
accessorial things,..... 239 – 241
pledge not seizable on execution,..... 204, 205
parties to contract,..... 242, 243
receiving a pledge does not suspend right of action, ... 234, 235
contract, when void, ... 244 – 247
sale of pledge, when and how made, ... 248 – 262
restitution of pledge, ... 262 – 273
PLEDGEE, see pawnee,..... 201 – 222
PLEDGOR, see pawnor, ... 201 – 222
POSSESSION, evidence of title,... 64, 65, 119, 132, 220, 246, 247, 464
gives a right of action, when, ... 64, 65, 193
follows the title, when,..... 64, 156, 157, 220
of property assigned,..... 257 – 259
of negotiable notes,..... 148, 193, 194, 225, 235
necessary to preserve a lien,..... 195, 196, 547 – 552
POSTMASTERS, their duties,..... 59, 60
PRECARIOUS LOANS, what are such,... 143, 145, 152, 153, 154 – 157
PRESCRIPTION, no right to personal property by,..... 222
PRESENTMENT, of notes and bills for payment,..... 112, 113
duty to make and protest,..... 112, 238, 239
PRESUMPTIONS, against carriers,..... 424, 565 – 570
against other bailees,.... 85 – 89, 128 – 131, 175, 176, 262 – 273
380 – 385, 402 – 408
PRINCIPALS AND AGENTS, relation between,.... 114 – 118, 121 – 126
214 – 220, 280 – 283, 438, 439
liability in respect to servants, ... 315 – 320, 438, 439
wife may act as husband's agent,..... 146
agent cannot pledge principal's goods,..... 192, 193, 194 – 196

PAGE.
PRINCIPALS AND AGENTS (Continued).
acts of agent, when those of principal,..... 316, 317, 438
see factors and agents,..... 117, 119
PRINCIPAL AND SURETY, right of surety,.. 225, 226, 234, 237, 264
PRICE OF HIRE, when due,... 335, 336, 354, 362, 382–385, 540–547
PROCEEDS, on sale of pledge, how held and applied,..... 236
PROHIBITORY STATUTE, substance of, ... 417, 418, 419
PROOF, burden of, 69, 71, 87–89, 128–131, 175, 176, 402–407, 452–502
on whom it rests,..... 227, 262, 304, 306, 320, 323
PROMISE, consideration for, ... 58, 59
mutual promises, ... 58
to pay a debt barred by statute,..... 58, 59
PROMISSORY NOTES, pledge of,... 193, 194, 197, 225, 226, 245, 247
when valid, ... 189, 197, 225, 227
PROPERTY, in goods ordered,..... 340–347, 353
considered with reference to statute of frauds, ... 347–353
when changed by confusion, ... 74–82
not changed on fraudulent sale,..... 92, 93, 160
nor by process of manufacture,..... 78, 83, 161
PROPERTY, special in bailee, ... 64–66, 142, 143, 353–356
nature and rights of, ... 64–66, 142, 340–356
when seizable on execution,..... 204–208, 255, 256
PROXIMATE CAUSE OF LOSS, what is,..... 455, 496, 498, 527
PUBLIC ENEMIES, who are, ... 463–468
PURCHASERS, rights of, in possession,..... 92, 93, 160, 162, 219, 220
right of action against bailee,. 116, 117, 200, 270, 274, 309, 314
under execution against bailor,..... 204–208
under execution against bailee,..... 255, 256
when to bear risk of losses, ... 219, 220, 348–352

Q

QUASI CONTRACTS,..... 556, 557
QUANTUM MERUIT,..... 363, 365

R.

RATS, losses caused by,..... 441, 442
RAILROAD COMPANIES, common carriers,..... 443, 519, 520
depositaries, when,..... 515–518
answerable for delay, when,..... 520–525, 526
for carriage of live stock, ... 572–576
on special contract, ... 468, 488, 490, 518, 519, 520
the English cases,..... 572, 573
as passenger carriers,..... 520
bound to carry all persons and property,..... 519, 520

PAGE.
REASONABLE TIME, delivery by carrier within, ... 520 – 527
RECOVERY, a change of title, when, ... 131 – 133, 272
RECOUPMENT of damages, when allowed, ... 213, 232
REDELIVERY, of property bailed, ... 83 89, 503, 513 – 540
when and where to be made, ... 177 184, 528 – 534
REDEMPTION of pledges, 200, 202, 203, 212, 230, 248, 249, 250, 251, 260, 269
of mortgages, ... 189, 190, 209, 210, 253, 254, 255
RELEASE of cause of action, how made, ... 129, 232, 361, 366, 367
REMEDIES, presumed to exist, ... 48, 49
REMEDY, on contract of deposit, ... 55 – 66, 65, 74, 75 – 82
on contract of mandate, ... 115 – 117, 108 – 115
on contract of loan, ... 262 – 272
on contract of pledge, ... 213, 226, 249, 250, 262
on contract of hire, .. 274 – 280, 298 – 307, 309 – 338 – 358, 359 – 385
on contract of common carriers, ... 552 – 577
RENT, on lease recoverable though buildings burned, ... 336 – 338
analogy with hire of chattels, ... 337, 338
RESTORATION, of things bailed, ... 177 – 187, 331 – 338
where and when made, ... 177 – 187, 333 – 335
RESTITUTION, of things borrowed, ... 177 – 187
of things pledged, ... 262 – 273
RETAINER, by an attorney, when necessary, ... 368, 369
how shown, ... 369
RESPONSIBILITY, of gratuitous bailees, ... 38 – 43, 66 – 74, 102 – 108
of bailees for hire, ... 371 – 385
of common carriers and innkeepers, ... 402 – 408, 454 – 468
RETURN OF GOODS BAILED, where and when made, 177 – 187, 333, 334
REVENUE OFFICERS, seizure by, ... 524
carriers must answer for, ... 523, 524
REVOCATION, of authority, ... 119 – 128, 153 – 158
of loans, ... 153 – 156, 157, 158
of contracts by bailor, when, ... 119 – 128
REWARD, effect of, on contract, ... 34, 465
RIGHT OF ACCESSION, ... 74 – 82, 222
ROBBERY, bailees not answerable for, when, ... 166
bailees answerable for, when, ... 167
common carriers and innkeepers, ... 402 – 408, 454 – 468, 463
ROAD, law of, ... 594 – 599

S.

SALE, when complete, ... 219 – 220
when void for fraud, ... 92, 93, 160

PAGE.
SALE (Continued).
actual delivery not necessary, ... 220
of things pledged, ... 231, 232, 270
effect of, on rights of bailee, 270, 274, 309, 310, 314, 315, 356
of pledge, how made and when compelled,.. 248 – 262, 261, 270
SALVAGE, lien for, when it exists,..... 57
allowed only for property saved, ... 57, 58
duties and rights of salvors,..... 57
SEALED deposits,..... 91
SEA-WORTHINESS, carriers answerable for,..... 498
SECOND BAILMENT,..... 83
SECURITIES, how treated as pledges,..... 237, 260, 261
taken by factor, effect of, ... 220 – 222
cumulative securities,..... 265, 266
SERVANTS, masters liable for acts of, ... 315 – 320
in their employment,..... 316, 317
but not for willful acts, ... 318, 319
sub-contractors not servants, ... 317
slaves treated as servants,..... 319, 320, 322, 323, 325
SHERIFFS AND RECEIPTORS, liable as bailees,..... 59 – 63
their duties are the same as to custody, ... 59, 60 – 63
SHIP-OWNERS, common carriers,..... 437 – 443
liability of, by statute, ... 480 – 484
charterer deemed owner, when,..... 439, 549, 550
under charter-party, ... 490, 502
are carriers when so employed,..... 437 – 441
bound to obey laws of the sea, ... 604 – 614
SHIPWRECK, when a loss by perils of sea, ... 496 – 498
when plundered, the wreckers, ... 496
SIGNS, when required by innkeepers,..... 415, 416
SKILL, degree of, required, ... 375, 380
exacted of bailee for services,..... 375 – 380
exacted of professional men, ... 358, 359, 367, 368, 369
exacted of sailors and navigators, ... 604 – 612
SLAVES, born during a tenancy for life, belong to tenant,..... 324, 325
do not belong to bailee for hire,..... 324, 325
death of, during bailment; effect of, on the contract,.. 335 – 338
duties of masters in respect to,..... 319 – 325, 328, 329, 337
care of them; bound to answer for their acts,..... 319 – 325, 337
liability of the carrier of, ... 428, 573
SPECIAL AGREEMENTS,..... 229, 230, 231, 302, 510, 513, 451
SPECIAL ACCEPTANCE, by common carrier, 468 – 490, 504, 505, 510 – 513
on a special contract,..... 468 – 490
to carry on deck, ... 510 – 513

PAGE.

SPECIAL ACCEPTANCE (Continued).
to carry by particular route or conveyance, ... 460, 461
SPECIAL CONTRACT of deposit, ... 135
right of common carrier to make, ... 468, 469
of charter-party, ... 502
of innkeepers to make, ... 405, 406
by public notices, how far restricted, ... 469 490
SPECIAL DELIVERY, ... 87, 211, 212
SPECIAL PROPERTY, what and when it exists, 64, 66, 153 – 158, 201 – 222
SPONTANEOUS offer, effect of, ... 114, 115
STAGE-COACHES, owners of, when common carriers, ... 432, 433
when answerable for packages, ... 434, 435
answerable as carriers for baggage, ... 433
cannot escape this liability by notice, ... 433
duties of, as passenger-carriers, ... 434
STATUTE RELATIVE TO FACTORS AND AGENTS, ... 215 – 218
STATUTE OF FRAUDS, pledges, &c., ... 257
not applicable to ordered goods, ... 347 – 353
STATUTE, liability of carriers by statute, ... 480 – 488, 570
under the English statute, ... 480 484
under our statute of 1851, ... 570, 575, 576
STATUTES, relative to navigation, ... 570, 604 – 607, 615
carrying lights, ... 604
and carrying passengers; see Appendix, ... 575, 603, 604, 615
STATUTE OF LIMITATIONS, when it applies, ... 268 – 270
in cases of pledges and pawns, ... 268, 269
STEAMBOATS, owners of, common carriers, when, 426, 428, 437, 438, 446
are common carriers when engaged as such, ... 426, 446
not when towing boats, ... 428, 573, 574
as passenger carriers liable for baggage, ... 427, 446
statutes relative to passenger carriers, ... 275, 603 – 618
STOCKS PLEDGED, sale of, ... 232
STOLEN PROPERTY, owner may follow, ... 92, 93, 160
STOPPAGE IN TRANSITU, right of, ... 535 – 539
when it exists, ground of, ... 535, 536
how exercised, ... 537
when determined, ... 537 – 539
STOWAGE, the carrier answerable for, ... 451, 503, 513
SURRENDER OF LIEN, how made, ... 210 – 212, 231, 548 – 551
SURETIES, how treated, ... 225, 226, 234, 237, 264

T.

TAVERNS and inns are the same, ... 390, 391
TEAMSTERS are common carriers, when, ... 430, 433

PAGE
TENANT, his obligation to pay rent after loss of tenement by fire, 337, 338
analogy between bailee for hire and tenant, 337, 338
TENDER, after forfeiture, 249
to common carrier, 553
TERMINATION OF CONTRACT, of hire, 331 – 338
by loss of thing bailed, 335 – 338
TERMS, legal language, 43, 44
THEFT, when committed by finder, 162
when by one hiring a chattel, 161, 162
when evidence of negligence, 166, 167, 227, 228
TICKETS, delivery of, to passengers, 581, 582
checking baggage, 581, 582
TITLE, evidence of, 119, 132, 220, 246, 247, 464
changed by capture, 464
TORTS, actions for, 54, 55, 555 – 559
acts of conversion, 55, 91, 92, 114, 129, 130, 226, 287, 291
of third persons, bailee when liable for, 402 – 408, 454 – 467
TOWNS, corporations, 389, 390
TRANSFER, of bill of lading by indorsement, 499, 500, 502, 543, 544
by delivery, 218, 219, 500, 502
of property bailed by recovery, 187 272
by sale of the same, 231, 270, 272, 500
effect of, on the contract, 270, 272, 500 – 502
by sale on execution, 204 – 210, 254, 256, 272
TRANSITU, stoppage in, 535 – 539
when it may be made, 535 – 539
when the transit is ended, 538, 539
TRESPASS, when sustainable against an infant bailee, 50, 51, 313, 314
when it may be brought, 50, 51, 161, 314
TRESPASSER, can acquire no title by his wrongful act, 78 – 83, 161
TRINITY-HOUSE, regulations of, 607 – 614
and their effect and force, 607 – 614
TROVER, the action of, when maintainable, 55, 129, 130, 558
what it put in issue, 55 – 57, 129 – 131, 558
when not sustainable, 130, 558
the fact of conversion material, 129, 130, 558
TRUCKMEN, common carriers? 429, 430
TRUST, when strictly personal, 158 – 160, 392, 393

U.

UNSEA-WORTHINESS, when carrier answerable for, 498
when it will defeat a policy of insurance, 498
USAGE OF TRADE, may be shown to explain contracts, 289, 510, 512
may be shown to determine mode of delivery, 526
as establishing a lien, when, 547, 548

PAGE.

USAGE OF TRADE (Continued).
may be controlled by special contract, ... 461
need not be positively known by both parties, ... 285, 286
USE, right of, by bailee, by depositary, ... 89 – 93
by the borrower, ... 147 – 151
by the pledgee, ... 222
by bailee for hire, ... 326 – 331
UNSOUNDNESS OF MIND, what, and its effects, ..51, 52 – 55, 146, 147
USURY, effect on contracts of pledge, ... 244 – 247, 263, 264

V.

VARIANCE, between pleadings and proof, ... 560, 561
in actions on contracts, ... 561
in actions of tort, ... 552 – 557
VALUATION, of things bailed, effect of, ... 173 – 175
does not change the contract, ... 174
VENDEE, when he bears the risk of loss, ... 353 – 356
what a delivery to, ... 220
VENDOR, when he retains the title, ... 340 – 353
and must bear the risk of loss, ... 340, 353, 356, 357
in executory contracts, ... 311
VESTED RIGHTS, what are not such, ... 388, 390
VESSELS, owners of, common carriers, when, ... 437 – 443
disabled on the voyage, effect of, ... 501, 502
VIS MAJOR, what is, ... 456 – 459
freezing of canals and rivers is, ... 457, 458
only suspends the carrier's duty, ... 458
falls on the carrier, to what extent, ... 459
when it does not excuse a loss, ... 460
VOLUNTARY SERVICES always deemed gratuitous, ... 370

W.

WAGONERS, are common carriers, when, ... 430 – 432
they are such, though not constantly so employed, ... 431, 432
formerly principal carriers, ... 431
WAIVER OF DAMAGES, what is, ... 332, 333, 361
of delivery by carrier, ... 519
WAIVER OF RIGHT OF ACTION, how made, ..232, 366, 367, 571, 572
not made by accepting goods of bailee, ... 129, 332, 333, 571
nor by permitting work to proceed under contract, ... 361
of right of redemption, ... 260
WAIVER OF LIEN, what is, ... 211, 307, 309, 412, 413, 549, 552
the lien accompanies the possession, ... 210, 307 – 309, 547 – 552

PAGE.
WAREHOUSE-MEN, who are such, ... 284 – 296
their duties and liabilities, ... 285, 286 – 296
when their duties begin, ... 291, 294
their rights, lien, ... 307 – 309
WAY-BILL, entry upon, ... 440, 570
WHARFINGERS, character of, ... 297 – 304
not common carriers, ... 298
duties as such, ... 298, 299
delivery to, ... 300
diligence required, ... 301
how discharged of their responsibility, ... 301, 302
their lien, ... 307 – 309
WIFE, may act as agent of her husband, ... 146
WITNESSES, of the law, ... 45, 46
when parties may be called, ... 304 – 305, 422, 423
WOMEN, MARRIED, when agents of their husband, ... 146
right of appointment as to separate estate, ... 243
WORK, ORDERED, demand for, ... 365
WORK, GRATUITOUS, no action for, ... 370